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The Zealous Advocate

CPCS Training Bulletin

CHIEF COUNSEL'S MESSAGE

William J. Leahy, Esq.

CPCS at a Crossroads: The Challenges Ahead

In the wake of the enactment of Chapter 54 in July, now is a good time to assess the condition of the right to counsel for indigent persons in Massachusetts, and to describe the challenges ahead. Much has been accomplished, but vitally important work remains to be done.

The most obvious and significant change, one that has attracted national attention and acclaim, has been the increase in the hourly rates paid to assigned private counsel. The combination of the August 1, 2004 and the July 1, 2005 rate increases raised hourly compensation from $30 to $50 per hour for the majority of CPCS assignments, from $39 to $50 for Care and Protection and Mental Health cases, from $39 to $60 for Superior Court criminal, SDP and YO cases, and from $54 to $100 for murder cases. We have estimated the annual additional cost of paying these higher rates at over forty-three million dollars at current rates of case intake and distribution of assignments. One way to measure the size of this increase is to note that in fiscal year 2004, just before the first of the two increases, total CPCS spending for assigned private counsel representation was just under $76 million. In fiscal year 2006, we estimate that total private counsel compensation will cost almost $120 million.

Unfortunately, the Legislature did not raise CPCS staff salaries, which are as inadequate in comparison to other Massachusetts agency and surrounding state public

IN THIS ISSUE:

CPCS Criminal Defense Training Unit:
Cathleen Bennett, Training Director
Paul Rudof, Staff Attorney
Kristen Munichiello, Administrative Assistant

defender salaries, as the private counsel hourly rates had been in comparison to those in effect in neighboring states, before the recent increases. This massive inequity must be addressed.

At the same time, the Legislature sought in Chapter 54 to create "a more effective balance between the use of public staff attorneys and private attorneys[,]" in response to the imbalance which had been highlighted in the Report of the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts at pages 11-12 (findings) and 20-22 (recommendations). CPCS had been drawing attention to the imbalance – indeed, in areas such as Juvenile Delinquency, Mental Health and Children and Family Law representation the almost total lack of balance — for many years, and has long urged increased statewide staffing in these areas. In Chapter 54, however, the Legislature decided to allocate 110 of the 130 new staff attorney positions to representation in District Court criminal cases, with only the balance reserved for the delinquency and CAFL priorities which CPCS has long advocated.

As required, CPCS developed a plan for staffing the new positions. In September, we filed a supplemental budget request which included the following major priorities:

- $24.4 million to fund the increased hourly rates;
- $912 thousand ($912,000) to fund staff salary increases as of Jan. 1, 2006;
- $7.25 million to fund the District Court, CAFL and Delinquency staff positions

Despite our efforts, the budget approved by the House in October provided $20 million for higher hourly rates, $4.56 million for additional staff positions, and no funding dedicated to increasing CPCS staff salaries.

We are now advocating vigorously for these priorities in the Senate, even as we continue to persuade the House to acknowledge and fund these critical needs. In particular, we are pressing hard for higher staff salaries, particularly the salaries of staff attorneys who in most cases could earn far more by accepting CPCS assignments than they currently earn in salary and benefits, and who are prohibited by statute from engaging in the private practice of law. We are also emphasizing the need to fully fund the private counsel hourly rate increases now, to remove once and for all any funding uncertainty.

Soon, CPCS will be crafting and presenting its budget proposal for the fiscal year ahead, FY07. Our challenge in that budget process will be to achieve permanent staff salary increases at a level no less than the salaries paid to employees of other Massachusetts government agencies; to achieve implementation of the second-year hourly rate increases recommended by the Counsel Commission last spring; and to direct additional CPCS staffing to the areas of Children and Family Law and Juvenile Delinquency representation where it is most urgently needed. I hope that every CPCS-compensated attorney will support these important and longstanding agency priorities, and will communicate that support to his or her local representative and senator.

FROM THE EDITOR...

I hope that you find this issue of the Zealous Advocate interesting and useful in your practice. I am grateful to the people who made this issue of the Training Bulletin possible: Kristen Munichiello and Paul Rudof whose work on the Bulletin is consistently excellent. We thank the attorneys who wrote articles for this issue.

Wendy Wayne, the CPCS Immigration Specialist, wrote to inform us about **What Happens to Criminal Defendants Who Are Deported to Haiti?** We need to be aware of the especially severe so-called "collateral" consequence that our Haitian clients suffer. We also need to educate prosecutors and judges about what will happen to these clients – perhaps it will be the factor that allows us to persuade the court to temper justice with mercy.

Brownlow Speer, head of the CPCS Appeals Unit and NLADA Kutak-Dodds Prize winner, wrote about the SJC's application of *Crawford v Washington* here in Massachusetts. Browny represented Mr Gonsalves on appeal and won a crucial victory for Gonsalves and for due process in *Commonwealth v Gonsalves.* **SJC's Gonsalves Opinion Applying Crawford v. Washington Points To End Of Use Of Police Hearsay Testimony As Sole Basis For Defendant's Conviction In Cases Of Alleged Domestic Assault**

In addition to writing the **Casenotes** and **keyword summaries** for this issue of the Zealous Advocate, Paul Rudof of the Criminal Defense Training Unit wrote about the SJC's most recent statement about false complaint evidence in **Bolting From *Bohannon*? The SJC's Troubling Discussion Of Prior False Allegation Evidence In Commonwealth V. Talbot.** He also wrote the **Training Alert**: **SJC Announces Standard for Ex Parte Rule 17 Motions** addressing the Court's decision in Commonwealth v. Mitchell, which he briefed and argued**.**

Finally, in **Message from the Cajun Dome: Life in a Hurricane Shelter,** we reproduce some of Stephanie Page's email about her experiences and observations while working in Lafayette, Louisiana as a member of the American Red Cross Disaster Relief Services.

Please let us know if you have comments you would like to share about the Zealous Advocate, suggestions for its improvement, or ideas for topics you would like to see addressed in future issues. I can be reached at cbennett@publiccounsel.net.

Thank you for your continued commitment to our clients and the cause of indigent defense.

Cathleen Bennett, CPCS Criminal Defense Training Director

INDIGENT DEFENSE NEWS

NOTICE TO CPCS DISTRICT COURT AND JUVENILE DELINQUENCY AND SUPERIOR COURT CERTIFIED ATTORNEYS

On December 5, 2005 MCLE will present Sex Offender Registration and Notification. All CPCS criminal defense practitioners on the District, Juvenile and Superior Court lists who have not yet attended previous offerings of this seminar are required to attend in order to maintain certification. The seminar will be held on **Monday December 5, 2005 from 9 am to 5 pm at MCLE, 10 Winter Place, Boston MA 02108**. To register you may go to www.mcle.org or call MCLE at 1-800-966-6253

CPCS ATTORNEYS RECEIVE AWARDS

Brownlow M. Speer was awarded the Kutak-Dodds Prize for outstanding service in public defense by the National Legal Aid and Defender Association (NLADA). The Kutak-Dodds Prize honors a person "who, through the practice of law, has contributed in a significant way to the enhancement of human dignity and quality of life of those persons unable to afford legal representation." NLADA presented the award to Browny on June 7, 2005 in Washington, DC. Never has an award been more richly deserved. Browny's Appeals Unit colleagues and friends led by Nona Walker deserve the credit for daring the vision, for preparing the nomination papers, and for spurring senior administrators into advocacy mode. We acknowledge invaluable support from former chief counsel Arnie Rosenfeld, Harvard Law School Professor Charles Ogletree, Boston College Law Professor and co-author Frank Herrmann, Mass. Law Reform Institute Director Allan Rodgers and attorney Tony Winsor, former CPCS appeals attorney Richard Zorza, former Appeals Unit colleague and head of our Lowell office Dan Callahan, Jayne Tyrrell of the Mass. Legal Assistance Corporation, Chief Justice Margaret Marshall and former Chief Justice Herbert Wilkins, among others.

Benjamin Keehn of the CPCS Public Defender Division Appeals Unit received the Lavallee Award from the Massachusetts Association of Court Appointed Attorneys (MACAA). The award recognizes Ben's contribution to the cause of indigent defense. It was presented at MACAA's Annual Meeting on Saturday, May 21, 2005 in Worcester.

CPCS Chief Counsel **William J. Leahy** was presented with the annual Outstanding Professional Achievement Award by the Boston Inn of Court at its year-end banquet on June 16 at Jimmy's Harborside. An excerpt from the letter Bill received from Justice Gordon Doerfer, a member of the Inn's executive committee, follows: "The legal community very much appreciates the fine continuing work you are doing to uphold the highest ideals of the legal profession and to improve the administration of justice here in Massachusetts."

Lawyers Weekly honored **David Nathanson** of the CPCS Private Counsel Post Conviction Division at their "Up & Coming Lawyers" annual cocktail reception on Tuesday, September 20, 2005 at the Moakley U.S. Courthouse. David was among the 15 "rising stars of the bar" honored this year.

Suffolk Lawyers for Justice honored **Anthony Benedetti** at their recent meeting for his work in the long and hard fought effort to raise private counsel compensation rates.

CONGRATULATIONS

The following CPCS Private Counsel Attorneys and Public Defenders received CPCS scholarships to attend the National Criminal Defense College, "Trial Practice Institute" held in June and July 2005 in Macon, Georgia:

Pamela Saia, Essex County
Susan Hamilton, Hampden County
Joseph Griffin, Suffolk County

Paul Rudof, CPCS Boston
Margaret Fox, CPCS Brockton
Jason Benzaken, CPCS Brockton
Kate O'Connell, CPCS Brockton

We congratulate them for successfully completing this intensive two-week criminal defense trial advocacy course. The 2006 NCDC "Trial Practice Institute" will be held in the Summer of 2006. CPCS hopes to continue to offer scholarships to CPCS Attorneys for this great program. The application for the 2006 program is not yet available. Look for updates in the next issue of The Zealous Advocate.

SUPER LAWYERS

Congratulations to the following CPCS Private Counsel and Public Defender Attorneys who have been named "Super Lawyers" in the November 2005 issue of *Massachusetts Super Lawyers 2005*

Joseph J. Balliro, Boston, MA
Daniel Beck, Cambridge MA
Thomas J. Butters, Boston MA
J.W. Carney, Jr., Boston, MA
Ralph J. Cinquegrana, Boston, MA
Michael A. Collora, Boston, MA
William D. Crowe, Boston, MA
Michael P. Doolin, Dorchester, MA
James M. Doyle, Boston, MA
Thomas Dreschler, Boston, MA
David Duncan, Boston, MA
Michael K. Fee, Boston, MA
Matthew H. Feinberg, Boston, MA
Patricia L. Garin, Boston, MA
Randy Gioia, Boston MA
James J. Gribouski, Worcester, MA
Andrew Good, Boston, MA
Bernard Grossberg, Boston, MA
Catherine J. Hinton, Boston, MA
Thomas M. Hoopes, Boston, MA
David P. Hoose, Springfield, MA
Stephen Balis Hrones, Boston, MA
Adam A. Kretowicz, Boston, MA
Peter B. Krupp, Boston, MA
William J. Leahy, CPCS Boston
Judith L. Lindahl, Boston, MA
Elizabeth A. Lunt, Boston, MA
Lawrence J. McGuire, CPCS Salem
Francis M. O'Boy, Taunton, MA
Stephanie Page, CPCS Boston
Charles W. Rankin, Boston, MA
Kevin J. Reddington, Brockton, MA
James C. Rehnquist, Boston, MA
Jon Revelli, Worcester, MA
Rosemary Scapicchio, Boston, MA
Robert L. Sheketoff, Boston, MA
Max D. Stern, Boston, MA
James L. Sultan, Boston, MA
John G. Swomley, Boston, MA
Larry Tipton, Boston, MA
Martin G. Weinberg, Boston, MA
Elliot M. Weinstein, Boston, MA
Norman S. Zalkind, Boston, MA

WELCOME

The following new bar advocates have recently completed training

Barnstable
Joseph Duffy

Bristol
Cory Arter
Lynne G. Turner
Dana Gravina
Joseph A. Feeney
Joseph A. Finn
Kelli M. Sarrett
Jason Buffington

Essex
Cheryl Vigliotta
Lisa Bruno
Robert McDonald
Thomas Palumbo

Franklin
Colin O'Brien

Hampden
Amy Preble
Tanya Moriarty
Bruce Brady
Dianna Abdala
Gina Paro

Middlesex
Brian D. Skerry
Ralph Patuto
Mark Bennett Holliday
Christopher Reardon
Ogar Okoye
Roland Milliard
Margaret Weir
Michael Charles Hicks
Joanna O'Neill
Donald Caliguri

Norfolk
James Ianiri
Joseph Mullin

Suffolk
Kevin Dwyer
Benjamin Weisbuch
Charlotte Creeley
Margaret Weir

Worcester
Michael Gilliatt
Michael Edmonds
Ralph Sargent
Joseph John Reardon, Jr.

The CPCS Public Defender Division welcomes nine new staff attorneys

Julie Bowden - CPCS Worcester

Alexei Garick - CPCS Worcester

Julie Ann Olson - CPCS Lowell

Alison Bloomquist - CPCS Salem

Benjamin Evans - CPCS New Bedford

Sarah Jane Forman - CPCS Roxbury/YAP

Dulcineia Goncalves - CPCS Roxbury/YAP

Dierdre O'Connor - CPCS Springfield

Jane Liu - CPCS Boston

IMMIGRATION NEWS AND VIEWS

What Happens to Criminal Defendants Who Are Deported to Haiti?

Wendy S. Wayne, Esq.
CPCS Immigration Specialist

Whenever representing noncitizens, defense counsel should attempt to avoid criminal convictions that will cause their deportation. Deportation often separates families and causes significant emotional distress. For Haitian clients, however, deportation may result in extreme physical suffering and even death.

When noncitizens are deported to Haiti because of criminal convictions (referred to as "criminal deportees"), they will be detained indefinitely in Haitian prisons. This policy of the Haitian government is designed to deter such deportees from committing crimes upon their return to Haiti, and to protect the public from people who were deported for criminal behavior. The deportees are often detained in Haitian prisons until relatives pay prison officials thousands of dollars for their release. In addition to the monetary requirement, a criminal deportee will be released only after an immediate relative swears in writing that she will take responsibility for the deportee upon his release, and agrees that if the deportee is alleged to commit a crime and is not apprehended, the family member will be arrested and detained until the deportee is caught. *INS Resource Information Center, Haiti: Information on Conditions in Haitian Prisons and Treatment of Criminal Detainees (2nd Response)*, p.4, February 12, 2002. If no immediate relative lives in Haiti, a criminal deportee will not be released unless a family member comes from abroad, for example from the U.S., to execute the affidavit of responsibility. *Id.* at pp.4-5.

It is a gross understatement to say that prison conditions are deplorable in Haiti where criminal deportees are detained. As described in *Auguste v. Ridge*, 395 F.3d 123,129 (3rd Cir. 2005):

> The prison population is held in cells that are so tiny and overcrowded that prisoners must sleep sitting or standing up, and in which temperatures can reach as high as 105 degrees Fahrenheit during the day. Many of the cells lack basic furniture, such as chairs, mattresses, washbasins or toilets, and are full of vermin, including roaches, rats, mice and lizards. Prisoners are occasionally permitted out of their cells for a duration of about five minutes every two or three days. Because cells lack basic sanitation facilities, prisoners are provided with buckets or plastic bags in which to urinate and defecate; the bags are often not collected for days and spill onto the floor, leaving the floors covered with urine and feces. There are also indications that prison authorities provide little or no food or water, and malnutrition and starvation is a continuous problem. Nor is medical treatment provided to prisoners, who suffer from a host of diseases including tuberculosis, HIV/AIDS, and Beri-Beri, a life threatening disease caused by malnutrition. At least one source…likened the conditions in Haiti's prisons to a "scene reminiscent of a slave ship."

In addition to starvation and horrific conditions inside Haitian prisons, inmates are often abused by police and prison officials. "Beating with fists, sticks, belts, and 'kalot marassa' – a severe boxing of the ears –[are] the most common form of abuse…Mistreatment also [takes] the form of withholding medical treatment from injured jail inmates." *Department of State Country Reports on Human Rights, 2003 – Haiti*, p.4.

As with most noncitizen criminal defendants, but especially with those born in Haiti, the most

important consideration for defense counsel is to avoid an aggravated felony conviction. "Aggravated felony" is an immigration term of art that is defined by statute, *8 U.S.C. 1101(a)(43)*, and by federal caselaw. The extremely broad definition includes many Massachusetts criminal offenses that are neither aggravated nor felonies. Many misdemeanors in Massachusetts are considered aggravated felonies. Of the twenty categories of offenses that constitute aggravated felonies, the most common categories are "crimes of violence" and "theft offenses" for which a sentence of one year or more is imposed or suspended (includes crimes such as A&B and shoplifting), and "drug trafficking," for which any conviction qualifies regardless of the sentence (includes possession with intent to distribute any class drug, except maybe class E). Other common categories of aggravated felonies are murder, rape, sexual abuse of a minor (regardless of sentence), and bribery, perjury and obstruction of justice (if sentence of one year or more).

Noncitizens with aggravated felony convictions are automatically deportable with virtually no relief available and are barred from returning to the U.S. for life. One of the only forms of relief from deportation available to a noncitizen with an aggravated felony conviction is under the Convention Against Torture, known as a CAT claim. Article 3 of the Convention Against Torture prohibits signatory countries, of which the U.S. is one, from deporting an individual to a country where there is a substantial likelihood that he will be tortured. To prevail on a CAT claim, a noncitizen must prove that it is more likely than not that he will be tortured with the acquiescence of the government. It is extremely difficult to prevail on a CAT claim under this standard.

Several courts in recent years have considered whether the indefinite detention of a criminal deportee in a Haitian prison rises to the level of torture required to prevail on a CAT claim. Except for the rare case in which the defendant was terminally ill or severely mentally ill or retarded, the Board of Immigration Appeals and federal courts have held that the prison conditions in Haiti, which cause many healthy inmates to die eventually of starvation or illness, do not amount to torture under CAT.

In the seminal case concerning CAT claims for Haitian deportees, *In re J-E-*, 23 I.& N. Dec. 291 (BIA 2002), the Board of Immigration Appeals enumerated five elements required to constitute torture under CAT: 1) the act must cause severe physical or mental pain or suffering; 2) it must be intentionally inflicted; 3) for a proscribed purpose; 4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and 5) not arising from lawful sanctions. *Id*. at 297 (citing *8 C.F.R. §208.18(a)*). "[T]he act must cause *severe* pain or suffering, physical or mental. It must be an *extreme* from of cruel and inhuman treatment, *not* lesser forms of cruel, inhuman or degrading treatment or punishment…" *Id*. at 297 (emphasis in original). The BIA held in *In re J-E-* that the Haitian government was detaining criminal deportees for a lawful reason and did not specifically intend to subject them to deplorable conditions, therefore, such detention alone did not amount to torture under CAT. The Third Circuit issued a similar decision earlier this year. *Auguste v. Ridge*, 395 F.3d 123 (3rd Cir., 2005).

Unless a Haitian criminal deportee has exceptional health issues, a CAT claim alleging that indefinite detention in a Haitian prison amounts to torture will fail. If the deportee has an aggravated felony conviction, no other waiver or relief exists to prevent his deportation. Criminal defense counsel must be extremely zealous, therefore, in their efforts to avoid aggravated felony convictions for Haitian clients who are not U.S. citizens. If these clients are deported, they will be subjected to prolonged physical and mental suffering, and perhaps even death.

SJC'S GONSALVES OPINION APPLYING CRAWFORD V. WASHINGTON POINTS TO END OF USE OF POLICE HEARSAY TESTIMONY AS SOLE BASIS FOR DEFENDANT'S CONVICTION IN CASES OF ALLEGED DOMESTIC ASSAULT

Brownlow Speer, Esq., CPCS Boston

The SJC's opinion of August 29, 2005, in Commonwealth vs. Hermany Gonsalves, applies the landmark Confrontation Clause decision of the United States Supreme Court in Crawford v. Washington, 541 U.S. 36 (2004), to a familiar scenario: a complaint to the police of an assault by the complainant's domestic partner (the future defendant), followed by (a) the complainant's refusal to testify against the defendant and (b) the Commonwealth's use at trial of the complainant's original complaint to the police, under the "spontaneous utterance" exception to the rule against hearsay.

In Crawford, the Supreme Court held that the Confrontation Clause of the Sixth Amendment bars the use against a defendant at trial of "testimonial" hearsay, unless the defendant at some point has opportunity to cross-examine the hearsay declarant. The Crawford court did not provide a definition of "testimonial," but said the term included all responses to police "interrogation." However, the Crawford court also left undefined the term "interrogation."

The SJC in Gonsalves holds that all "investigative" questioning by a police officer constitutes "interrogation." Therefore, all responses by a complainant or other person to an officer's "investigative" questions are "per se testimonial" and cannot be used at trial against a defendant unless the defendant has had an opportunity to cross-examine the hearsay declarant. It does not matter that the complainant's hearsay declaration may have been made in a state of excitement so as to qualify as a "spontaneous utterance" under Massachusetts law. If the "spontaneous utterance" is "testimonial," the Confrontation Clause bars its admission against the defendant in a criminal case, unless the defendant has had an opportunity to cross-examine the hearsay declarant. The SJC in Gonsalves holds that the Confrontation Clause "trumps the common-law rules of evidence."

Police questioning is not "investigative," and therefore does not elicit a "testimonial" response (i.e., one which cannot be used against the defendant without an opportunity for cross-examination), in only two situations. The first is when the police are trying to secure a "volatile scene." The second is when the police are trying to establish the need for medical care or to provide medical care. In both of those situations, police questioning is of an "emergency" (non-"investigative") nature, so the responses to police questions are not per se testimonial. Statements by a complainant or other person to a civilian witness, as opposed to a police officer, are also not per se testimonial.

However, a hearsay statement which is not "per se testimonial" may be found by the trial judge to be "testimonial in fact," so as to make it inadmissible under the Confrontation Clause unless the defendant has had opportunity to cross-examine the hearsay declarant. The criterion of a hearsay declaration that is "testimonial in fact" is that a reasonable person in the declarant's position would anticipate the statement's being used against the accused in investigating and prosecuting the crime.

In Gonsalves, the sobbing complainant was asked by her mother "what happened" and replied, in substance, that the defendant had assaulted her. A police officer appeared on the scene, asked the still-sobbing complainant "what happened?," and received a similar response. The complainant's statements to both the mother and the police officer qualified as "spontaneous utterance" exceptions to the rule against hearsay. However, the statement to the officer was in response to investigative questioning; it was therefore "per se testimonial" and barred by the Confrontation Clause. By contrast, the statement to the mother was not "per se testimonial" because it was a statement to a civilian. Since it did not appear to be "testimonial in fact," and since it was otherwise admissible as a hearsay exception, the Confrontation Clause did not bar its use against the defendant at trial.

BOLTING FROM BOHANNON? THE SJC'S TROUBLING DISCUSSION OF PRIOR FALSE ALLEGATION EVIDENCE IN COMMONWEALTH V. TALBOT

Paul Rudof, Esq., CPCS Training Unit

The last issue of The Zealous Advocate contained a "Watch Out" from Carol Donovan discussing the holding in Commonwealth v. Talbot, 444 Mass. 586 (2005) "that a defendant, upon request, is entitled to the presence of counsel at a presentence interview conducted by the probation department." C. Donovan, "Watch Out: SJC Rules That Defendants Are Entitled To Presence of Counsel at Presentence Interviews Conducted by Probation," The Zealous Advocate: CPCS Training Bulletin, Vol 14, No. 2 at 15 (July 2005). That was the good news from Talbot. At the risk of proving Sophocles right when he said, "Nobody likes the man who brings bad news," I will now call to your attention a more troubling portion of the Talbot opinion.

At the trial in Talbot, where the defendant was charged with the sexual abuse of her minor daughters perpetrated by her boyfriend, the defense theory was that although the abuse did occur, the defendant was uninvolved in and unaware of the abuse. Contrary to this defense theory, the minor daughters did testify that their mother actually directed them to engage in sexual acts with her boyfriend, in order to prepare them for marriage. To challenge the credibility of her younger daughter the defendant sought to introduce evidence that this daughter, at the age of seven, told a classmate that she was having sex with her boyfriend, but when confronted by school officials, stated that "she didn't mean it" and "it was a joke." The evidence was excluded and the SJC concluded that the trial judge did not err in that ruling.

Because this was a unique case in that the defendant was not denying that sexual abuse occurred, the issue of the exclusion of the prior false allegation evidence was a secondary issue in the defendant's appeal. Perhaps because of that, the SJC's treatment of this issue is not particularly well-considered. Consequently, trial courts might rely on Talbot to exclude prior false allegation evidence which, under a more thoughtful analysis of a defendant's due process and fair trial rights and the whole body of case law in this area, should be admitted.

In a single paragraph of analysis, the SJC states the following:

> Contrary to the defendant's claim, the evidence is not admissible under the narrow exception of Commonwealth v. Bohannon, 376 Mass. 90, 92-96 (1978) . . . . *Admissibility under the Bohannon rule requires a showing that "the witness was the victim in the case on trial, her consent was the central issue, she was the only Commonwealth witness on that issue, her testimony was inconsistent and confused, and there was a basis in independent third-party records for concluding that the prior accusations of the same type of crime had been made and were false."*

Talbot, supra at 590-591 (quoting Commonwealth v. Sperrazza, 379 Mass. 166, 169 (1979)) (emphasis added).

This articulation of the law governing the admissibility of Bohannon evidence (in italics above) appears to establish requirements for admissibility which have never been so rigidly formulated before. In fact, the opinions reliance on Bohannon and Sperrazza as authority for this formulation appears to be misplaced. Sperrazza was a murder case involving no allegations of sexual abuse where the defendant sought to introduce evidence that a witness—obviously not the victim—previously fabricated a claim that she had been kidnapped.

The quotation from Sperrazza contained in this opinion is simply a recitation of the "special circumstances" in Bohannon which served to distinguish that case from Sperazza, not a hard and fast list of requirements for the admissibility of this type of evidence. Sperrazza, supra

at 169.

Similarly, Bohannon itself does not state that these factors constitute rigid requirements which must be met to introduce this type of evidence; these were simply the factual circumstances which existed in that particular case that led the SJC to conclude that the exclusion of this disputed evidence amounted to reversible error. The Appeals Court recognized just this point in Commonwealth v. Nichols, stating, "We do not understand the list of the Bohannon circumstances made in Commonwealth v. Sperrazza, 379 Mass. at 169, to require that every aspect of Bohannon must be present before the Bohannon exception may be applied." 37 Mass. App. Ct. 332, 337 (1994). Because a literal reading of Talbot could lead to the conclusion that the factors listed in Sperazza and repeated in Talbot do constitute requirements for admissibility, a careful examination of some of these so-called requirements is in order.

First, it is particularly troubling that this opinion states that consent must be at issue in the trial in order to introduce Bohannon evidence. Such a threshold requirement would completely eliminate this type of evidence in any trial where the theory of defense is that no assault ever occurred, including all child sexual assault trials. In those cases, the credibility of the complainant is as much at issue, perhaps even more so, as in consent defense cases, and this type of evidence is just as probative.

In fact, at least one appellate opinion does not consider consent being an issue at trial a prerequisite for the admission of Bohannon evidence. In Commonwealth v. Nichols, consent was not at issue because the defendant was charged with sexual offenses against a minor, and yet, the Appeals Court overturned the conviction on the ground that the Bohannon evidence had been improperly excluded. The Appeals Court, having correctly noted that the factors discussed in Bohannon were not rigid requirements, then stated, "So, for example, in the instant case consent to the sexual conduct is not an issue . . . [b]ut the circumstances are such as to cause the evidence of the collateral allegation — obtained from an independent source — to be exceptionally probative so far as the credibility of the victim witness is concerned." Nichols, supra at 337.

To go even farther, Bohannon and subsequent case law hint that the admissibility of prior false accusation evidence may not be limited to sexual assault cases. In Bohannon, the SJC highlighted the significance of the fact that the excluded evidence was "[e]vidence of prior false accusations *of the specific crime which is the subject of the trial*." Bohannon, supra at 95 (emphasis added). Thus, in an assault and battery trial, evidence that the alleged victim previously made a false complaint also of assault and battery may be equally as probative as the evidence at issue in Bohannon. In fact, in Commonwealth v. LaVelle, the Appeals Court considered the exclusion of a prior false complaint of threats in a trial for distribution of a counterfeit controlled substance, and instead of holding that the evidence was not admissible because the case did not involve charges of sexual assault, the Appeals Court instead emphasized the fact that the prior false complaint "did not involve the specific crime which is the subject of the trial." 33 Mass. App. Ct. 36, 40 (1992). Therefore, if prior false complaint evidence could be admitted in the right non-sexual assault case, it cannot be true that a dispute over consent must exist to permit the introduction of this type of evidence.

Also of concern in the Talbot opinion is the purported requirement that a complaining witness's testimony at trial be "inconsistent and confused" before any Bohannon evidence may be introduced. The Bohannon Court did not treat that characterization of the evidence as an admissibility requirement, but rather considered it on the question of how much the defendant was prejudiced by the exclusion of the prior false allegation evidence. "[T]he possibility that this evidence might have had a significant impact on the issue of credibility is enhanced by the fact that the complainant's testimony was inconsistent and confused. Thus the proffered evidence, if believed, might have had a significant impact on the issue of consent and consequently on the outcome of the trial." Bohannon, supra at 95.

Again, the Nichols decision properly does not treat inconsistency and confusion in the complainant's testimony as an absolute prerequisite to the admission of Bohannon evidence, stating, "although[] one may poke holes in the consistency of Lynn's testimony, it does not seem as notably inconsistent as that of the victim witness in Bohannon," but still concluding that the evidence was improperly excluded. To hold that a defendant may not present Bohannon evidence unless the complainant's testimony has been "inconsistent and confused" would effectively mean that Bohannon evidence is admissible in weak Commonwealth cases but not in strong ones. Such a double standard for admissibility cannot exist, and the Bohannon decision does not appear to mandate this outcome.

Finally, there is the stated requirement that there is "a basis in independent third-party records for concluding that the prior accusations of the same type of crime had been made and were false." While this assertion does enjoy some support in the case law, see, e.g., Commonwealth v. Hrycenko, 417 Mass. 309, 317 (1994) ("A necessary circumstance for this exception is that there is a basis in independent third-party records for concluding that the prior accusations of the same type of crime had been made and were false." (quotation omitted)); Commonwealth v. Savage, 51 Mass. App. Ct. 500, 503 (2001) ("Prerequisite to a Bohannon admission . . . is establishment in third-party records of a basis to believe that the prior accusation is false."), Bohannon never articulated this factor as a prerequisite to admissibility. Rather, the Bohannon Court merely pointed out that defense counsel possessed such a record as a sound offer of proof.

It is certainly a fair statement of the law that a defendant must be able to demonstrate the falsity of the prior accusation in order to present such evidence, but to require specifically that that proof of falsity be contained in "third-party records" seems too rigid a mandate. One could imagine situations where the form of the proof of falsity lay elsewhere: a complainant who previously accused someone of a sexual assault in front of ten other people and all ten people are prepared to testify that the assault did not occur; a diary of the complainant herself in which she acknowledges fabricating a previous accusation of sexual assault. In Commonwealth v. Bishop, the SJC more appropriately articulated this requirement that the defendant have some form of sufficient proof of the falsity of the prior complaint: "Bohannon's requirement [is] that there be a factual basis for concluding that the victim[] . . . had made the allegations and that the allegations were false." The sufficiency of that factual basis should not rise or fall on the fortunes of whether it exists in a third-party record, but instead on whether it can be established through competent and convincing evidence.

In sum, Talbot articulates as rigid requirements for admissibility several factual circumstances which, though important to the outcome in Bohannon, were never set out in that opinion as hard and fast admissibility prerequisites. Thus, beware the prosecutor or judge who waives Talbot about as the proper formulation of the admissibility requirements for Bohannon evidence. Challenge that prosecutor or judge to look beyond the stated admissibility test in Talbot, particularly at Bohannon itself, to see that Talbot is not a particularly well-considered discussion of this issue. And do not shy away from attempting to introduce prior false allegation evidence simply because you cannot meet the so-called admissibility requirements articulated in Talbot, because as the SJC said in Bohannon, "When evidence concerning a critical issue is excluded and when that evidence might have had a significant impact on the result of the trial, the right to present a full defense has been denied." Bohannon, supra at 94.

CPCS TRAINING ALERT

SJC ANNOUNCES STANDARD FOR EX PARTE RULE 17 MOTIONS

Paul Rudof, Esq., CPCS, Boston

On July 29, 2005, the SJC issued its decision in Commonwealth v. Mitchell, 444 Mass. 786 resolving the questions of whether a defendant may move ex parte for a Rule 17 summons for pretrial review[1] of third party records and whether those records, once received, may be reviewed by the defendant on an ex parte basis. The Court ultimately held that "in rare circumstances, an ex parte motion may be an appropriate procedure by which to obtain a court order compelling the pretrial production of 'books, papers, documents, or other objects, Mass R. Crim. P. 17(a)(2), in the custody of a third party." In reaching this conclusion, the SJC rejected the Commonwealth's position that because Rule 17(a)(2) does not explicitly provide for these ex parte procedures, they should never be available. Instead, the Court recognized that both Rules 13(a)(3) and 14(a)(6) vest the trial court judge with the discretion to permit such ex parte procedures "for cause shown" or "upon a sufficient showing."

Unfortunately, in addressing what situations would amount to "cause shown" or "a sufficient showing," the Court limited the availability of this ex parte procedure to "rare" or "extraordinary" or "exceptional" circumstances. Specifically, the Court rejected the need to protect trial strategy, work product, or client confidences as legitimate reasons to proceed ex parte. In fact, the Court identified only two reasons why a defendant should ever be permitted to pursue third party records on an ex parte basis: (1) to prevent the disclosure of incriminating evidence to the Commonwealth that it would not otherwise be entitled to receive, and (2) to prevent destruction or alteration of the requested

The SJC set out a rather elaborate procedure governing this type of pursuit of third-party records:

First, the Court stated that "[a]n ex parte motion for a rule 17(a)(2) summons should be filed . . . *only after the pretrial conference has occurred and the Commonwealth has furnished its discovery*." (emphasis added) The opinion, however, does not make clear whether one must wait until discretionary discovery is provided, or only automatic discovery, before filing the ex parte motion.

Second, the defendant may then file "a motion requesting that summonses for documents returnable prior to the trial be issued ex parte and under seal." This motion might be titled "Motion for Leave to File Ex Parte Lampron Motion" or "Motion for Leave to Conduct Ex Parte Review of Records," depending upon whether it is the filing of the Lampron motion or the review of the records which you would like to do on an ex parte basis (or you may be seeking to do both). Like all pretrial motions governed by Rule 13, this motion should be accompanied by an affidavit setting forth the factual basis justifying the requested ex parte procedure. To be allowed, this motion must demonstrate "in specific terms and in detail, why it is necessary to proceed ex parte" by demonstrating either "(1) a reasonable likelihood that the prosecution would be furnished with information incriminating to the defendant which it otherwise would not be entitled to receive; or (2) a reasonable likelihood that notice to a third party could result in destruction or alteration of the requested documents." It is unclear from the opinion whether this motion and affidavit should be filed at the same time as or prior to the filing of your Rule 17/Lampron motion and affidavit requesting the summons itself issue. In certain cases, the judge may not be able to determine whether to allow the ex parte procedure without reviewing the actual Rule 17/Lampron motion and affidavit.

Third, once the motion is filed, the judge must then hold a hearing to determine the propriety of the ex parte procedure. Generally, the Commonwealth will be permitted to be both present and heard at this hearing. The Commonwealth should be provided with a copy of the motion and affidavit redacted by the court. "[T]he judge should seal or impound only as much of the defendant's motion and affidavit as is

absolutely necessary to protect the defendant's interests." Thus, prior to any hearing at which the Commonwealth will be present, make sure to ask the judge to seal or impound as much of whatever motions and affidavits you have filed as is necessary to protect your interests. The Court notes that "there may be cases, however, in which, as a consequence of the need for extensive sealing or impounding, the Commonwealth is unable adequately to respond to the defendant's request, or where the Commonwealth's presence would vitiate the purpose of the motion entirely." It is unclear what happens in this event. The SJC then instructs that a stenographic record should be made of any such hearing.

Fourth, once the judge resolves whether the defendant may proceed ex parte, the judge then must determine if the motion and affidavit have met the Lampron standard justifying issuance of the summons. It is unclear whether this hearing happens on the same date as or on a later date than the hearing on the ex parte issue. Again, the opinion indicates that the Commonwealth should provide input at the hearing regarding the relevance of the records sought, though the SJC does state that this interest of the Commonwealth "is not absolute and may be overridden in exceptional circumstances," at which point "a judge is perfectly capable of making the relevancy and other determinations without the input of the Commonwealth." Thus, if you have reason to believe the Commonwealth's presence at this relevancy hearing would lead to either the modification or destruction of the records sought or the Commonwealth's discovery of inculpatory evidence you would not otherwise need to provide, you may request that the relevancy hearing be conducted in the absence of the Commonwealth.

Fifth, if the judge concludes that the defendant has met the Lampron standard and thus issues the summons, if a privilege is then asserted, the hearing on whether the records are in fact privileged may not be an ex parte proceeding. The SJC reiterates what it said in Pelosi and Oliveira, that if no privilege is asserted or found, the defendant may then inspect and copy the records.

Sixth, once the records are made available to the defendant, the judge has discretion to allow or restrict the Commonwealth's access to those records, except to the extent that the reciprocal discovery rules or pretrial agreements mandate disclosure to the Commonwealth.

The bottom line is that if there is a "reasonable likelihood" that disclosure of some or all of your Rule 17 motion and affidavit or of the records sought via that motion and affidavit would result in either (1) furnishing incriminating evidence to the Commonwealth to which it would not otherwise be entitled or (2) the modification or destruction of the records, file a motion for leave to proceed ex parte, prior to or along with your normal Rule 17 motion and affidavit. To succeed, your motion for leave to proceed ex parte must establish "in specific terms and in detail" a "reasonable likelihood" that one of those two concerns will arise absent the requested ex parte procedure.

Good luck navigating the latest murky and meandering alley in the ever-expanding maze that is the pursuit of third-party records.

(Footnotes)

[1] In footnote 12 of Mitchell, the SJC makes clear that a defendant, pursuant to both Rule 17 and G.L. c. 233, § 1, may summons records to a hearing or trial at which those records will be used without having to file a motion to obtain judicial approval for the summons.

MESSAGE FROM THE CAJUN DOME: LIFE IN A HURRICANE SHELTER

Stephanie Page, Esq. CPCS Boston

Stephanie Page, CPCS Public Defender Division, went to Louisiana in the aftermath of Hurricanes Katrina and Rita as a member of the Red Cross Disaster Relief team, pursuant to the Commonwealth's 15 day leave policy for Red Cross Disaster Relief. CPCS CAFL employees Kally Walsh and Margaret Higgins also traveled south as Red Cross Disaster Relief volunteers to help hurricane victims. Stephanie's mother's family was from Pas Christian, Mississippi. She did what so many of us wanted to do when we saw the images of destruction and people in need on television. She volunteered to go and help. When Stephanie arrived in Baton Rouge, she was assigned to the shelter in the Cajun Dome in Lafayette. She was there from September 28th through October 15th. Her access to the internet was very limited. Here is an unedited excerpt of the email messages she sent us while she was there:

Date: Mon, 3 Oct 2005 23:49:38 -0400 Day 5

Hi all - Just wanted to get in touch. I am at the Cajun Dome in Lafayette, La. It is about 2 hrs. north of New Orleans and about 1 hr. east of Lake Charles [near Texas]. The night I arrived the population of the Dome went from 1200 to about 3800 in 5 hours. My shifts have ranged from 20 hours to about 12 hours. The residents are terrific - even in all of their despair and desperation.

People are still arriving. In busloads and carloads. Often this is the first "help" they have received. Typical stories: father, mother, 2 small kids and 2 rescued dogs who have been stuck on the side of the road with no water or food - and it is hot here. People walking 30-40 miles to get here. So many have seen their loved ones die or disappear in the water, floating by, having to let them go; laying next to a wife when a tree falls through the roof and kills her. So many still not knowing if their child, parent, spouse, partner are alive. So many so thankful that at least they have their pictures.

People from New Orleans and Katrina have been here from 8/29; people who had to come as a result of Rita have been here since Labor Day. Many have lost their homes 3 times - with Katrina, then the Dome evacuation for Rita to Shreveport and back to the Dome after Rita. Many now list their home address as the Dome.

90% of people in Louisiana were born here. 80% have lived here for generations - never having left the state or even their Parish. Being uprooted means something totally different than what I have previously understood. The poverty and illiteracy rates are extremely high. Some parents have been unable to spell their children's names.

There have been 2 attempted suicides, lots of threats to – We were able to talk someone down enough in time to get them to mental health; some sexual and other assaults, theft and drugs since I have arrived. As the shock wears off and reality sets in it is expected that this may increase. Hopefully it will not. As in any large group the percentages still seem to shake out to reflect the general population.

So often though you will see such genuine acts of kindness: one resident helping/giving/sharing something with someone who has just been victimized and the refrain often is – "well baby they must have needed it more than me … if I can only get my pictures back …"

The elderly, those who are alone, the children - trying mentally to be brave and strong for the others in their family or strangers. The little kid who is struggling to carry something way to big so that he can help. Everyone's biggest fear is that someone falls through the cracks. We found an elderly woman stuck in a corner who hadn't eaten for days, needed medical care and got her to the hospital - hopefully in time. We are now doing constant bed to bed checks to make sure this doesn't happen again.

The bureaucratic red tape is mind boggling - our government couldn't make things more frustrating. It is hard to believe people can maintain any semblance of dignity and hope in these conditions - but most do.

I so far have been lucky re: shelter. The 1st night there was no room but a church took me in. I slept on the floor with the fire ants and no a/c. A space then opened up in a room with 20 cots. There is a shower with hot water. This was more than I expected. Headquarters has limited Internet access. Cell phones work sporadically. All of this of course could change on a dime.

I don't have the words or ability to adequately describe all of this - and probably never will - but one thing I do know is that this is nothing that the United States of America can be proud of. Other than that I just don't know ….

I will be in touch.

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October 7 or 8, 2005: Hi all - Well it is day 10 for me. People are still coming in. Normally Red Cross Shelters are opened for 1-3 week max. There is no closing date for the Dome. Still many have been able to leave. When I arrived the count was 1200. That night it soared to over 3800 in only 5 hours. It is now hovering around 1800. It is a city.

Somehow I have been made a shelter manager for the 4-12 shift. I don't know exactly how that happened other than I was out of the room for about 5 minutes when decisions were made. I never trained in it and really didn't pay any attention to the structure and responsibilities of the managers. I signed on to just be a person who did what they were asked/told. What it shakes down to is that I am the one responsible for all of the residents, volunteers, medical, building and all other issues for that period. I have to work closely with security [Red Cross/MP's/National Guard/Local Police]. The 4-12 is really 4 - 1-2:30 a.m. with meetings at 8 a.m. and 3 p.m. It is hard to get out of here at a reasonable time or for any real length of time. Things just sort of happen. Dealing with the security people and trying to keep residents who become upset and frustrated and begin acting out under the cop radar so that they don't get arrested or banned is a challenge. Often the legitimate frustration is interpreted as actual aggression. There is a lot of miscommunication here that can be set right if given a chance. The security people have a lot of discretion. Most resent being here and think the residents are scamming, etc. Absent some obvious criminal act I get a chance to affect their decisions. That gets really interesting.

I have learned that "biohazard" describes anything from vomit to feces to lice infested bedding to chemical spills. I am learning walkie talkie cop talk. I have two different radios and two cell phones that constantly ring. It is very important in order get anything done to know the wiggle room in the rules. For those who have been banned I am able to get them out bedding and food and make sure they have a way to another shelter. There really is no state social service net work here.

We have been able to give vitamins and shots to families and kids for the 1st time ever. Many have never seen medical before. This exposure to health care may be life changing.

The surreal experiences never stop. Football games on national TV in the next stadium over with people coming here to buy tickets. I guess they are not able to see what I see.

I was walking in the back of the Dome last night checking for the forgotten when I heard piano music coming from an abandoned room. I went over and there was a small baby grand piano with a young woman playing Chopin [I think]. It was unbelievable - and yes I did go back to see if it really existed this morning! Thankfully it did.

Day 11: The count is 769. What a difference a day makes. As the residents leave the pressure seems to decrease - as long as nothing unexpected happens - please ....

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Update from the Dome:
Day 12: A volunteer in the next bed to mine was bitten by a black widow spider. Luckily she made it to the ER in time – she had 9 minutes to go. It is excruciatingly painful. And we are in a good shelter …

Day 14: Had to get everyone moved from the Dome to the Convention Center today – over 600 people. This is yet another displacement for those who have been in the Arena since August. People are understandably upset but we manage to do it. Got everyone moved except for 20 or so. The Dome needs to start making money with their basketball and concerts. It was a long day emotionally and physically.

Day 15: Took side trip to New Orleans. The French Quarter Looks like a ghost town. Smells of rotting meat. All the fridges are on the street with food in them. They can't be removed until the coolants are. Maggots … but no cats, dogs, etc. A few bars open but nothing else. People walking around with that look in their eye that this may well be hopeless to even try to make this work – but they are.

The ninth ward? So eerie to see the markings on each house with the body count – live and dead – and date of search. Animal Rescue and ASPCA also did searches – house by house. It is hard to believe that these living conditions exist in America – even before the storms. These are third world living conditions. The working poor deserve better. The nonworking poor do too. This is an embarrassment for any conscientious person in a country that has so much … Is this even on the news?

FEMA came to the Dome tonight – to ask residents to fill out a form they had already filled out 3 times. It was madness – I had to use a bullhorn – but we managed to prevent anything really ugly from happening. FEMA even forgot to bring the forms so that meant another hour for people to wait in yet another line. I don't know how people are putting up with this without reacting physically – I don't know if I could.

Day 16: Took a side trip in the other direction – south and west. Went as far as allowed down on the Inter coastal Hwy towards Esther and Abbeville. About 20 minutes out of Lafayette the destruction started. First the bent billboards, the giant trees totally uprooted – roots and all. Started seeing piles/hills of rubble out of nowhere. The closer to the coast: on one side of the road there were the steps to the house, on the other side of the road was the house; foundations of homes with the matchstick like contents strewn all over – house after house. Signs: waiting for FEMA – where are you; Photos $2.00, videos $5 – We need help … As I got to the water there were shrimp boats which are bigger than the fishing boats you normally see up here, tossed and stacked up on each other onto the land. You could see the path of the water where it had receded leaving tons of debris. I went off on a couple of side roads. Saw two cemeteries – remembering now that this is 7 weeks or so after the storms: coffins out of the ground, covers opened; water in the original grave sites – heard stories that the National Guard had real problems with trying to sort the proper remains into the right coffins … Still no animals around. As horrific as this devastation is at least people have property to come back to. The New Orleans ninth ward does not …

Day 17: Count went up from 424 to 529. The thought is that people are trying to get back closer to home. The Dome won't and can't shut down until it drops to 200 or so. The Red Cross will then move to a smaller shelter. No one will be left without a place to stay.

We were told this afternoon that we can not take any one else in. No room at the inn. Two families showed up after we were told we could not accept any more people. Two teenage boys arrived so that they could take their grandmother tomorrow to help her get all the rattlesnakes out of her house. She had checked in with us last night and I had promised her that her grandsons would get a place to sleep. She was distraught. Somehow when I looked at her original form their names were on it and I could let them in. The other family I could not. They had no earlier contact with the Dome.

I did get them food, water and bedding and told them to check back again in the morning. I tried to rationalize this . . . but the bottom line is that I can't. There was just no work around for them and there were too many officials around at the time they arrived so I could not get away with slipping them inside.

Ten year old Michael learned that we (this contingent of Red Cross volunteers) are leaving tomorrow. New volunteers will be coming. He is a great kid – lots of spirit and sadness. He said that he was never going to make any more friends – ever … because everyone always leaves. He has been here for weeks. Luckily there are volunteer social workers who work with children and they will watch out for him…

See you all soon. Stephanie

CASENOTES

This section of the Training Bulletin contains a list of every Supreme Judicial Court and Appeals Court opinion concerning criminal law that was handed down in May, June, July, and August of 2005. Following each citation is a list of key words relating to all of the issues discussed in that particular opinion. These key words do not necessarily correspond precisely with the keywords listed in the opinions headnotes. In addition, this section contains a brief discussion of the issues in these cases, but not of every opinion and not of every issue in a particular opinion. We have selected only those cases and only those issues within those cases which appear to be of some significance. Where appropriate, we have also included criticism, analysis, and/or practice tips.

Commonwealth v. Ramos, 63 Mass. App. Ct. 379 (2005): indecent assault and battery, prior bad acts, common scheme, plan, pattern, accident, mistake, sentence

Commonwealth v. Ahart, 63 Mass. App. Ct. 413 (2005): possession with intent, cocaine

Commonwealth v. Hernandez, 63 Mass. App. Ct. 426 (2005): ineffective assistance of counsel, joinder, modus operandi, strategic decision, mistrial (no write-up)

Commonwealth v. Urkiel, 63 Mass. App. Ct. 445 (2005): bench trial, resisting arrest, self-defense, unreasonable force, good faith

Commonwealth v. Harmon, 63 Mass. App. Ct. 456 (2005): murder, accessory after the fact, search warrant, affidavit, probable cause, nexus, jury instructions, consciousness of guilt (no write-up)

Commonwealth v. Beaudry, 63 Mass. App. Ct. 488 (2005): rape, medical records, closing argument, sexual knowledge, professional misconduct, credibility

Commonwealth v. McAfee, 63 Mass. App. Ct. 467 (2005): interlocutory appeal, motion to suppress, search warrant, impoundment, premises, interior, exterior, prior delay, inevitable discovery

District Attorney for the Norfolk District v. Quincy Division of the District Court Department, 444 Mass. 176 (2005): complaints, probable cause, motion to dismiss

Commonwealth v. Shindell, 63 Mass. App. Ct. 503 (2005): withdraw, guilty plea, colloquy, collateral consequences, ineffective assistance of counsel

Commonwealth v. Martin, 444 Mass. 213 (2005): self-incrimination, Miranda, physical evidence

Commonwealth v. Lam, 444 Mass. 224 (2005): standing, summons, records

Commonwealth v. Rogers, 444 Mass. 234 (2005): consent, enter, search, warrantless, voluntariness, ambiguouos, acquiescence, claim of authority

Commonwealth v. Verde, 444 Mass. 279 (2005): confrontation, business record, official record, prima facie, closing argument, vouching for credibility, ineffective assistance of counsel

Commonwealth v. Horton, 63 Mass. App. Ct. 571 (2005): exit order, inventory search, impoundment, pretext, investigatory motive, required finding of not guilty, possession

Commonwealth v. Bowen, 63 Mass. App. Ct. 579 (2005): motion for new trial, coercion, due process

Andrew v. Commissioner of Correction, 63 Mass. App. Ct. 912 (2005): juvenile, murder, first degree, good time credits, emergency law (no write-up)

Commonwealth v. Griffen, 444 Mass. 1004 (2005): protective order, ex parte, service, knowledge

Commonwealth v. Martin, 63 Mass. App. Ct. 587 (2005): identification, one-on-one, showup, suggestive, exigent circumstances, reliability, in-court identification, mug shot, sanitize, speedy trial, intent, required finding of not guilty

Commonwealth v. Clayton, 63 Mass. App. Ct. 608 (2005): petit jury, grand jury, due process, bill of particulars, prior bad acts

Commonwealth v. Sebastian S., 444 Mass. 306 (2005): pretrial probation, continuance without a finding

Commonwealth v. Kincaid, 444 Mass. 381 (2005): postverdict inquiry, extraneous influence, taint

Commonwealth v. Erazo, 63 Mass. App. Ct. 624 (2005): divers dates, bill of particulars, notice, alibi, continuing episodes, dismissal, specific unanimity

Commonwealth v. Isabelle, 444 Mass. 416 (2005): motion in limine, request, attorney, interrogation, right to counsel, curative instruction

Commonwealth v. Le, 444 Mass. 431 (2005): identification, substantive evidence, impeachment, confrontation, cross-examination, suggestive

Commonwealth v. Bienvenu, 63 Mass. App. Ct. 632 (2005): trafficking, motion to suppress, inventory search, impoundment, expert, severance, antagonistic defenses, required finding of not guilty, constructive possession, joint venture (no write-up)

Commonwealth v. Damiano, 444 Mass. 444 (2005): motion to suppress, telephone, wire communication, fruit of the poisonous tree, attenuation

Commonwealth v. Rodriguez, 63 Mass. App. Ct. 660 (2005): discharge, dismissal, deliberating, juror, voir dire, deadlocked jury, jury instruction

Commonwealth v. Johnston, 63 Mass. App. Ct. 680 (2005): assault with intent to murder, malice, murder, justification, excuse, mitigation, intoxication, mental illness, jury instructions, specific intent, reasonable doubt

Commonwealth v. Caceres, 63 Mass. App. Ct. 747 (2005): summons, records, contempt, relevance, affidavit, motion to quash, notice

Commonwealth v. Murphy, 63 Mass. App. Ct. 753 (2005): jail credit

Moe v. Sex Offender Registry Board, 444 Mass. 1009 (2005): final classification, ineffective assistance of counsel, timeliness, moot (no write-up)

Commonwealth v. Pagan, 63 Mass. App. Ct. 780 (2005): motion to suppress, pat frisk, safety, high crime area, resisting arrest, required finding of not guilty

Commonwealth v. Smith, 444 Mass. 497 (2005): DNA, felony, state prison, District Court

Commonwealth v. Almonte, 444 Mass. 511 (2005): murder, first degree, motion to suppress, statements, custodial, invocation, photographic array, extrajudicial identification, in-court identification, cross-examination, confrontation, humane practice instruction, joint venture, specific unanimity, Cuneen factors

Commonwealth v. Rosario, 444 Mass. 550 (2005): distribution, third-party perpetrator evidence, in-court identification, self-incrimination, jury instructions, speculation

Commonwealth v. Edwards, 444 Mass. 526 (2005): forfeiture by wrongdoing, waiver, hearsay, confrontation, grand jury testimony, unavailable, threats, coercion, persuasion, pressure, collusion, conspiracy

Commonwealth v. Keohane, 444 Mass. 563 (2005): murder, first degree, extreme atrocity or cruelty, armed assault in a dwelling, jury instructions

voluntary manslaughter, provocation, ineffective assistance of counsel, strategic decision, third-party perpetrator evidence, race, autopsy photographs, individual voir dire, duplicative convictions

Commonwealth v. Wright, 444 Mass. 576 (2005): murder, first degree, deliberate premeditation, hearsay, joint venture, prior consistent statement, recent contrivance, inducement, credibility

Commonwealth v. Talbot, 444 Mass. 586 (2005): expert testimony, diabetes, motive to lie, prior false allegation, presentence investigation, presentence interview, presentence report, right to counsel, supervisory power, fairness, lifetime community parole

Commonwealth v. Foreman, 63 Mass. App. Ct. 801 (2005): armed career criminal, violent crime, conviction, adjudication of delinquency, deadly weapon (no write-up)

Commonwealth v. O Laughlin, 63 Mass. App. Ct. 805 (2005): required finding of not guilty, motive, means, opportunity, consciousness of guilt, third-party perpetrator evidence, identity, DNA

Commonwealth v. Copson, 444 Mass. 609 (2005): Interstate Agreement on Detainers

Commonwealth v. Bly, 444 Mass. 640 (2005): murder, first degree, ineffective assistance of counsel, prior conviction, impeachment, resurrection

Commonwealth v. Rasmusen, 444 Mass. 657 (2005): felony-murder, first degree, criminal responsibility, duplicative convictions (no write-up)

Commonwealth v. DiJohnson, 63 Mass. App. Ct. 855 (2005): larceny, required finding of not guilty, independent contractor, employee

Commonwealth v. DeMarco, 444 Mass. 678 (2005): murder, first degree, deliberate premeditation, extreme atrocity or cruelty, prior bad acts, motive, ineffective assistance of counsel, involuntary manslaughter (no write-up)

Iamele v. Asselin, 444 Mass. 734 (2005): restraining order, extension

Commonwealth v. Lugo, 64 Mass. App. Ct. 12 (2005): motion to suppress, motion to reconsider, search warrant, scope, motor vehicle

Commonwealth v. Righini, 64 Mass. App. Ct. 19 (2005): discovery, witness, date of birth, police officer, confrontation

Commonwealth v. Hampton, 64 Mass. App. Ct. 27 (2005): youthful offender, assault and battery by means of a dangerous weapon, retroactivity, jury trial, sentencing, continuance

Commonwealth v. Jaundoo, 64 Mass. App. Ct. 56 (2005): rape, child, indecent assault and battery, pornography, probative value, prejudice, corroboration, limiting instruction, vouching

Commonwealth v. Brazeau, 64 Mass. App. Ct. 65 (2005): operating under the influence, motion to suppress, stop, interfere, impede, rearview mirror

Commonwealth v. Shellenberger, 64 Mass. App. Ct. 70 (2005): negligent operation, notice, foundation, expert testimony

Commonwealth v. Hill, 64 Mass. App. Ct. 131 (2005): identification, motion to suppress, suggestive, showup

Commonwealth v. Mitchell, 444 Mass. 786 (2005): records, ex parte, summons, subpoena, pretrial production

Commonwealth v. Reed, 444 Mass. 803 (2005): records, summons, relevance, excited utterance, curative admissibility, denial

Commonwealth v. Cutts, 444 Mass. 821 (2005): murder, first degree, ineffective assistance of counsel, homosexual panic, criminal responsibility, diminished capacity, cocaine-induced psychosis,

motion to suppress, statements, voluntary, prior bad acts, motive, admission, autopsy photograph

Commonwealth v. Fleury, 64 Mass. App. Ct. 282 (2005): murder, first degree, second degree, common law, withdraw, plea (no write-up)

Commonwealth v. Colon, 64 Mass. App. Ct. 303 (2005): admission, credibility, witness, harmless, cross-examination, unresponsive, ultimate issue, hearsay

Commonwealth v. Gonsalves, 445 Mass. 1 (2005): confrontation, witness, unavailable, testimonial, police interrogation, per se testimonial, testimonial in fact, volatile scene, medical care, reasonable person

Commonwealth v. Foley, 445 Mass. 1001 (2005): confrontation, police interrogation, per se testimonial, reasonable person, testimonial in fact, volatile scene, medical care, voluntary

Commonwealth v. Rodriguez, 445 Mass. 1003 (2005): confrontation, testimonial, police interrogation, per se testimonial, jury instruction, discipline, child

Commonwealth v Ramos, 63 Mass.App.Ct. 379 (2005) In a prosecution charging a doctor with nineteen counts of indicent assault and battery against eight female patients, the Appeals Court found evidence of similar treatment of five other patients only minimally probative of a pattern and the absence of mistake, because the testimony of the eight victims of the charged conduct sufficiently established the pattern and absence of mistake. Nonetheless, as the judge gave appropriate limiting instructions and the jury only convicted the defendant of thirteen of the nineteen charges, the Appeals Court concluded the defendant was not prejudiced by the admission of this prior bad act evidence.

Commonwealth v. Ahart, 63 Mass. App. Ct. 413 (2005) Rejecting the defendant's challenge to his conviction for possession of cocaine with an intent to distribute, the Appeals Court found the following evidence sufficient to prove the intent to distribute element: this seventeen year old high school student was carrying ten separately packaged bags of cocaine, worth a total of $200 to $400, at school half an hour before lunch when, according to expert testimony, drug deals often occur.

Commonwealth v. Urkiel, 63 Mass. App. Ct. 445 (2005) At the bench trial on charges of assault and battery (on which he was acquitted) and resisting arrest (convicted), both sides agreed that the warrantless entry into the defendant's home to effectuate a misdemeanor arrest (for a restraining order violation) violated his constitutional rights. The police officers involved and the defendant, however, offered sharply contrasting versions of what occurred when the police attempted to arrest the defendant, each side claiming the other initiated a physical assault on the other. In comments the trial judge made rejecting the defendant's argument that the unlawful entry into the home itself constitutes unreasonable force by the police, justifying forceful resistance by the defendant, the judge suggested that he was therefore not considering self-defense at all to the resisting arrest charge, an error the Appeals Court found warranted reversal, because the defendant's

testimony concerning the police-initiated assault merited consideration of self-defense. The Appeals Court found the trial judge's apparent failure to consider self-defense on the resisting charge particularly "puzzling" given the fact that the judge clearly discredited significant portions of the arresting officer's testimony and even acquitted the defendant on the charge of committing an assault and battery on the officer.

On retrial, the Appeals Court directed the trial judge to consider whether the Commonwealth can prove a special provision of the resisting statute, which requires that the officers made "a judgment in good faith based upon surrounding facts and circumstances that an arrest should be made," in light of evidence that the police knowingly overlooked the warrant requirement in the face of the defendant's known residency, "evident accessibility," and "the size and nature of the [restraining order] violation."

Commonwealth v. Beaudry, 63 Mass. App. Ct. 488 (2005) Stating that "where a prosecutor expressly urges in her closing that a child victim's sexual knowledge was derived from identified acts of abuse, there must be an adequate and specific basis in the record for such a claim that excludes other possible sources of such knowledge," the Appeals Court concluded that the prosecutor here established "a marginally adequate foundation" for such argument simply by asking the alleged victim if "anything like that had ever happened to you before." However, the Appeals Court noted that in future cases, prosecutors who wish to make this type of argument will be held to a higher foundational standard, requiring them to adduce evidence eliminating other possible sources for sexual knowledge.

Relatedly, the Appeals Court finds no reversible error in the fact that the prosecutor made this argument despite her knowledge that the alleged victim was aware of a prior sexual assault committed by the defendant against the alleged victim's sister—in other words, another potential source for the alleged victim's sexual knowledge apart from the alleged assault against her. Concluding that the prosecutor "managed to skate a fine line between proper argument and reversible error (or even bar sanctions)" and thus did not engage in professional misconduct, the Appeals Court reasoned that "it [was] at least plausible that [the prosecutor] believed that the victim had been informed only of general details" about the assault on her sister, "insufficient to account for her graphic sexual knowledge.

Finally, while the Appeals Court seemed to disapprove of the portion of the prosecutor's argument where she suggested the alleged victim should be believed because she came into court and testified, it concluded that the judge's instruction which asked the jury to disregard any such argument sufficiently cured any error.

Commonwealth v. McAfee, 63 Mass. App. Ct. 467 (2005) Based on surveillance and conversations with informants and buyers, the police had what both sides agreed was probable cause to believe the defendant was selling cocaine out of his apartment. After stopping a buyer just after leaving and driving away from that apartment and learning from him that the defendant had just sold him cocaine, the police approached the apartment door, asked through the door if they could speak with him, and when he said "no," pried the door open and restrained the defendant. While being frisked, he told the police that he had a gun in a drawer upstairs and marijuana in his pocket. The police then obtained a search warrant, relying on information gained both before and after the entry, returned, and searched the apartment, finding the gun, $1600 in cash, and two cut sandwich baggies, but no cocaine. **The Appeals Court concluded that Article 14 prohibited the police in this situation from securing the premises *from the inside* before obtaining the warrant.**

The Court reasoned that at the time the police approached the apartment door, they lacked an objectively reasonable belief that evidence would be destroyed without executing the interior

impoundment, noting "the complete absence of evidence of a risk that the defendant had discovered or been informed of the police investigation or the detention of his recent customer." Further, the Commonwealth could not rely on the defendant's refusal to come to the door when the police knocked and announced themselves to justify entering the apartment for the interior impoundment, because the police engaged in "prior delay" in obtaining the warrant, choosing not to obtain the warrant when they had four days to do so after they developed probable cause.

As a result of this Article 14 violation, the Appeals Court concluded that the defendant's statements and the marijuana must be suppressed. However, because the affidavit for the warrant would have established probable cause to search for cocaine, even excising the post-interior impoundment information, the gun, cash, and baggies inevitably would have been discovered and thus should not be suppressed.

District Attorney for the Norfolk District v. Quincy Division of the District Court Department, 444 Mass. 176 (2005) The SJC concluded that neither the clerk-magistrate nor the district court judge had the authority to refuse to issue complaints when the police had made a warrantless arrest of the defendant. Instead, the defendant must wait until after the complaints issue, at which time he may litigate via a motion to dismiss whether the police had probable to support the charges.

Practice Tip: This case puts sharper teeth into the notion of moving to dismiss charges in District Court when the charges are not founded on probable cause.

Commonwealth v. Shindell, 63 Mass. App. Ct. 503(2005) The Appeals Court refused to allow the defendant to withdraw her guilty plea to indecent assault and battery due to any failure to inform her of the sex offender registry consequences or due to the judge's exceeding the defendant's sentence recommendation. First, sex offender registry is a collateral consequence and, moreover, the language of that statute, G.L. c. 6, § 178E(d), explicitly states that failure to inform a defendant of the registry requirements "shall not be grounds to vacate or invalidate the plea." Second, the record shows that the judge did inform the defendant of the sentence he intended to impose *prior to* her pleading guilty.

Commonwealth v. Martin, 444 Mass. 213 (2005) The Supreme Judicial Court holds that under Article 12, physical evidence found by the police as a result of statements which the police obtained from the defendant in violation of Miranda must be suppressed as the unlawful fruit of the Miranda violation. The Court reasoned that to suppress only the statements and not the physical evidence obtained as a consequence of those statements would constitute an "inadequate remedy" which might actually encourage Miranda violations. This decision required the SJC to read Article 12 as providing greater protections than the Fifth Amendment to the U.S. Constitution, because the Supreme Court had held to the contrary under the Fifth Amendment in United States v. Patane, 124 S. Ct. 2620 (2004).

Practice Tip: This case is yet one more example of why it is important always to cite to state constitutional protections and not merely to the federal constitution.

Commonwealth v. Lam, 444 Mass. 224 (2005) The SJC first holds that the Commonwealth has standing to challenge a defense request for a court-issued summons for third-party records, pursuant to Rule 17(a)(2). The Court reasons that (1) the Commonwealth "will often be able to assist a judge in determining whether [the

defense motion] involves an improper 'fishing expedition," and (2) the Commonwealth "has an interest in preventing unnecessary harassment of a complainant and other Commonwealth witnesses caused by burdensome, frivolous, or otherwise improper discovery requests."

The SJC then concludes that the request for the following records had met the Lampron standard, while broader request had not: school records regarding the two specific dates when the complainant claimed the defendant committed the assault, journals, held by the complainant's father, purportedly recording the dates of the assaults, electronic communications spanning a four year period, held by the father of a friend of the complainant.

Commonwealth v. Rogers, 444 Mass. 234 (2005) The SJC affirmed the motion judge's order suppressing drugs because the evidence at the hearing-that when the police knocked on the door to the defendant's apartment, a woman answered and, in response to the police asking where the defendant was, she and two others pointed toward the kitchen-failed to establish that the woman consented to the police entry into that apartment. The Court reasoned that the words and actions of the police and the woman were ambiguous, which "makes it difficult to discern whether there was actual consent in this case." Because "the Commonwealth must provide us with more than an ambiguous set of facts that leaves us guessing about the meaning of this interaction," the Court held that the Commonwealth had failed to prove that consent to enter had been given.

The SJC went on to state that "[e]ven should we assume that [the woman's] actions were an unambiguous signal allowing the police to enter the apartment, the Commonwealth has failed to satisfy its burden of proof that [the woman's] alleged consent was sufficiently voluntary to comply with the requirement for a warrantless search." Where the armed officers did not identify themselves prior to or while knocking on the door and never stated their purpose, but merely asked where the defendant was, "the Commonwealth…failed to demonstrate that … [her] response was anything other than 'mere acquiescence to a claim of authority."

Having resolved the matter on these grounds, the SJC did not reach the question of whether the woman had authority to consent to the entry or whether the police reasonably believed she had such authority, the grounds on which the motion judge decided the case. Moreover, the majority criticized the dissent for relying on several theories not even offered by the Commonwealth.

Commonwealth v. Verde, 444 Mass. 279 (2005) Even in light of Crawford v. Washington, the SJC held that the admission of drug certificates of analysis without testimony from the chemist who performed the testing and signed the certificate does not offend the Confrontation Clause. The Court reasoned that such certificates qualify as "business records" or "public records" and because the admissibility of these types of records "was well established in 1791," when the Confrontation Clause was adopted, the admission of these certificates does not implicate Confrontation Clause concerns.

Practice Tip: Trial attorneys must continue to object to the introduction of drug certs, ballistics certs, and any similar documents on Confrontation Clause grounds, because the SJC may not be the final word on this issue, particularly since there appears to be a split of authority on the issue. See, e.g., City of Las Vegas v. Walsh , 91 P.3d 591 (Nev. 2004) (nurse's chain-of-custody affidavit concerning method of conducting and preserving blood alcohol test is testimonial); People v. Rogers, 780 N.Y.S.2d 393 (N.Y. App. 2004) (report of blood test is testimonial).

Also, appellate attorneys should note that, according to footnote 2 of the opinion, if a trial occurred pre-Crawford and the trial attorney only objected to hearsay on hearsay grounds without raising the Confrontation Clause argument, such argument is not waived on appeal.

Commonwealth v. Horton, 63 Mass. App. Ct. 571 (2005) Affirming a denial of a motion to suppress, the Appeals Court holds that after police stopped a car driving with a canceled license plate, their observations of a back seat passenger reaching below his leg and kicking at something, coupled with the fact that the stop occurred in the middle of the night in a high crime area, justified an exit order to that passenger, which led to the discovery of a gun on the floor of the car.

The Appeals Court went on to affirm the denial of a motion to suppress a second gun found in a closed bag in the trunk pursuant to an inventory search, finding that although the driver was not arrested until after the second gun was discovered, impoundment of the car "was contemplated from the beginning of the traffic stop" and thus, the inventory search was not a pretext for investigation. The motion judge, who also rejected the defendant's pretext argument, did so "on his erroneous finding of fact that [the driver] was arrested before the search, reasoning that towing was then necessary because there was no one left to drive the car." Unfortunately for appellate attorneys, the Appeals Court relied on the principle that "[w]hen the findings of a motion judge are not adequate to support his conclusions of law, an appellate court can make its own findings to support the motion judge's conclusions of law."

Commonwealth v. Bowen, 63 Mass. App. Ct. 579 (2005) The defendant, who pled guilty to multiple indictments and received concurrent sentences of eight to ten years incarceration followed by probation (the agreed-upon recommendation), moved for a new trial on the grounds that his plea was coerced when his lawyer told him (a) that if he did not plead, he would likely lose at trial, and (b) that the judge had indicated in a lobby conference that he would sentence the defendant to 25 – 30 years in prison if convicted after trial. The defendant supported his motion with both his own affidavit and that of his trial counsel, attesting to these claims. The Commonwealth opposed the motion, supported by an affidavit from the prosecutor who attended the lobby conference stating that the judge did not threaten the 25-30 year sentence if the defendant were convicted after trial. The trial judge, although stating that he did not recall threatening in the lobby conference to impose a 25 – 30 after trial, nonetheless allowed the motion for a new trial "in the exercise of caution." **Holding that the mere claim of coercion, without a factual finding that such coercion occurred, is insufficient to allow a motion for a new trial, and that an "exercise of caution" "cannot substitute for the required findings of fact," the Appeals vacated the order allowing the motion and remanded to the trial judge for the requisite factual findings.**

Commonwealth v. Griffen, 444 Mass. 1004 (2005) In a trial charging violations of a protective order, the trial judge excluded from evidence the ex parte protective order itself on the ground that it was not properly served because a police officer merely read the order verbatim over the phone to someone identifying herself as the defendant. **Although the SJC agreed that this phone conversation did not constitute proper service of the protective order, it nonetheless vacated the trial judge's exclusionary ruling, reasoning that because the Commonwealth need only prove the defendant's knowledge of the order and not proper service of it, the order was relevant to show what the police officer said to the defendant and her resulting knowledge of the order and its terms.**

Commonwealth v Martin, 63 Mass. App. Ct. 587(2005) The complainant, while walking in a wooded area, was grabbed from behind and briefly physically assaulted, before bystanders arrived, causing the assailant to flee into the woods. The complainant described her assailant, though did not mention any distinguishing marks on his face. She was then shown a number of mugshots, including the defendant's, without identifying anyone. Over the next four days, the police drove her around, stopping possible suspects and asking her if any were the attacker. For some of these, the police took photographs which they then showed to the complainant. On the fourth day, her father saw the defendant, whom he thought might be the

assailant, and called the police, who then detained the defendant while they brought the complainant to view him. This was the first instance in which her father was present for such a show-up, and when she asked the police to bring the defendant closer, she identified him as the attacker, stating that she recognized a particular mark on his forehead. The police then photographed the defendant, placed that photo in an array, and showed the array to the complainant, who again identified him. Years later at trial, she identified him in the courtroom as her attacker.

Holding that the one-on-one show-up identification of the defendant was impermissibly suggestive and that the Commonwealth had failed to prove an independent basis for the subsequent in-court identification, the Appeals Court reversed the convictions where the jury appeared "to have struggled with the identification element." The Court notesthat one-on-one showups are generally disfavored but "are acceptable in the immediate aftermath of a crime or in exigent circumstances." The Court then concludes that this case did not fall into either of those classes of cases, as the show-up occurred four days after the incident and the police could have taken the defendant's photograph and presented it in an array, like they did for others in the previous days. Moreover, the father's presence added a special element of unfairness. In footnote 2, the Court rejects the Commonwealth's argument that the fact that the complainant viewed many others in show-ups prior to the defendant reduces the suggestiveness and that she did not identify any of them shows her reliability. The Court posits another possibility—that as the days passed, the complainant felt increasing pressure to identify someone—but ultimately concludes that both of these arguments amount to "unsupported speculation."

Significantly, the Appeals Court points out that under Article 12, if the identification procedure was unnecessarily suggestive, a per se rule of exclusion applies regardless of whether the witness was certain or reliable.

Finally, the Court disagrees for two reasons with the motion judge's conclusion that the in-court identification resulted from an independent, untainted source. First, while the motion judge found that the complainant's description possessed "remarkable accuracy," the judge failed to acknowledge that the original description lacked the one detail which the complainant mentioned when she identified the defendant. Second, the motion judge failed to consider the way in which the suggestive show-up, followed by the suggestive photo array tainted any subsequent in-court identification.

In the event of retrial, the Appeals Court concludes that the mug shot initially shown to the complainant (which she did not identify) should have been sanitized to exclude information about its provenance, though the Court "leave[s] it to the discretion of the trial judge whether to sever the front and side views in the mug shows and whether to give a special instruction to the jury regarding the mug shots."

Comment: While the Appeals Court says the trial judge will have discretion in deciding whether to give a cautionary instruction concerning the defendant's mug shot, it likely would be error for the judge to refuse a defense request for such an instruction. See Commonwealth v. Blaney, 387 Mass. 628 (1980) (including language to use in such an instruction); Commonwealth v. Richardson, 425 Mass. 765 (1997) (stating that a judge is not required to give the instruction when the defense fails to request it).

Commonwealth v. Clayton, 63 Mass. App. Ct. 608 (2005) The Appeals Court holds that the defendant's due process rights were not violated when the petit jury returned a guilty verdict on a statutory rape indictment based on evidence of natural sexual intercourse when the indicting grand jury heard evidence

only of acts of unnatural sexual intercourse. "To comply with art. 12 due process requirements, the Commonwealth need not present to the grand jury evidence of each theory under which the defendant may be found guilty at trial of the crime for which he is indicted."

The Appeals Court also concluded that the trial judge did not abuse his discretion in admitting prior bad act evidence—that the defendant had attempted to arrange for the victim and the defendant's son to engage in sex acts while the defendant watched. The Court reasoned that the incident was highly probative, as it occurred "during the period of abuse charged," and showed "a pattern of sexualized conduct with the victim and . . . the defendant's desire for her and control over her in sexual matters."

Commonwealth v. Sebastian S., 444 Mass. 306 (2005) The SJC holds that a judge may not place a defendant on pretrial probation as a disposition following an admission to sufficient facts. After a defendant tenders an admission, the judge may continue the case without a finding of guilt, but is not authorized by statute to place the defendant on pretrial probation.

Commonwealth v. Kincaid, 444 Mass. 381 (2005) The defendant was convicted of four counts of aggravated rape, based on evidence that he and a coventurer raped the complainant while she was unconscious and videotaped the incident. At his trial, the defendant, supported by testimony from his girlfriend who claimed to have watched the video, testified that the encounter was consensual and that the coventurer had taken the videotape, which was never recovered or shown to the jury. The judge instructed the jury that there were various legal reasons why coventurers would be tried separately, though in reality, the coventurer was then a fugitive. Eight months after the verdict, the defendant moved for a postverdict inquiry, contending that the deliberating jury had been exposed to extraneous information that the coventurer had fled. After conducting a hearing at which all the deliberating jurors were questioned, the trial judge found that the jury had been so exposed and that the Commonwealth failed to prove beyond a reasonable doubt that the extraneous influence did not prejudice the defendant, and thus ordered a new trial. **The SJC affirmed the trial judge's new trial order, concluding that his factual finding of the existence of an extraneous influence was not clearly erroneous and that because the deliberating jurors could have assumed that the coventurer fled with the videotape because it showed that the complainant was in fact raped, the Commonwealth failed to prove beyond a reasonable doubt that the influence did not prejudice the defendant.**

In reaching this conclusion, the SJC holds for the first time that a defendant claiming extraneous influence on a jury must prove such exposure merely by a preponderance of the evidence, because "we should not make it excessively difficult for the defendant to establish the existence of the taint."

Additionally, the SJC emphasizes that the defendant need not prove the source of the extraneous information, merely "that the knowledge did not come from the evidence at trial."

Finally, the SJC suggests that because judges conducting taint hearings "may not inquire into the deliberative process of the jury," judges should give "cautionary instructions to each juror at the outset of the inquiry and, if necessary, again during the inquiry . . . . The jurors can be instructed to respond about any information that was not mentioned during the trial (appropriate), but not to describe how the jurors used that information or the effect of that information on the thinking of any one or more jurors (inappropriate)." However, if a judge, even unintentionally, learns that a juror was influenced by extraneous information, "that information cannot be ignored" and "there must be a new trial."

Commonwealth v. Erazo, 63 Mass. App. Ct. 624 (2005) The Appeals Court concluded that where the complaint alleged sexual assaults on divers dates on or about July 15, 2002 through October 15, 2002, and the Commonwealth's bill of particulars specified that the assaults were continuing episodes beginning "a few days to a week after July 9, 2002" and "occurred approximately three to four times a week thereafter, until approximately October 15, 2002," the district court judge exceeded his discretion in dismissing the complaint as providing insufficient notice to the defendant. Noting that, "the case before us falls into that category of indictments which describe undifferentiated sexual assaults over a finite period of time," The Appeals Court reasoned that the Commonwealth disclosed as much specific information to the defense as it was capable of ascertaining from the complainant and that "other remedial steps[are] available to [the defendant] when the case is remanded for trial," such as a voir dire on the complainant's reliability and cross-examination regarding the complainant's faulty memory.

Further, even though the complainant alleges multiple sexual assaults but only one such charge will be before the jury, the Appeals Court determined that unless the evidentiary picture changes at trial, the defendant will not be entitled to a specific unanimity instruction because "the complainant cannot separate the alleged criminal episodes by giving specific dates and that they are so closely connected as to amount to a single criminal episode."

Commonwealth v. Isabelle, 444 Mass. 416 (2005) Although the SJC acknowledges that the Commonwealth committed "clear error" by eliciting testimony that when the defendant was asked if she had harmed her baby, she asked for her lawyer, 4 justices of the Court nonetheless voted to affirm the conviction because "the record establishes beyond a reasonable doubt that the improper reference did not contribute to the verdicts." In reaching this conclusion, the majority relied on the following: this was the only reference to the defendant's request for an attorney; the jury was aware the defendant had legal representation at the time she was questioned; the jury was made aware that after this initial request for a lawyer, the defendant did go on to speak with the detective, such that the jury was not left to believe the defendant was seeking to hide something; although no curative instruction was given, the defendant did not request one and the jury was told to disregard any answers which were struck, as this one was; and there was "substantial evidence of the defendant's guilt," such as the testimony of several witnesses (including the other possible abuser of the child) which conflicted with the defendant's. (The dissent takes great issue with this claim, noting both that the Court must find "overwhelming" evidence of guilt rather than "substantial," and that this was a "classic, triable case." The dissent further points out that the only factor weighing in the Commonwealth's favor is the fact that there was only one reference to the request for counsel; on the other side of the scale, there was no curative instruction, the Doyle error was clearly attributable to the Commonwealth and "troublesome in the extreme" given that the Commonwealth violated a judge's order on the defendant's motion in limine to exclude this testimony, and the testimony was extremely harmful because, even though the jury heard the defendant subsequently spoke with the detective, they learned that her first reaction to being asked about harming the child was to request to see her lawyer.)

Commonwealth v. Le, 444 Mass. 431 (2005) Changing the rule previously articulated in Commonwealth v. Daye, 393 Mass. 55 (1984), the SJC announces that a police officer may testify that a witness made a pretrial identification of the defendant and the jury may consider that testimony as substantive evidence, not just as impeachment, even when the witness denies or does not recall the pretrial identification. The Court, following United States v. Owens, 484 U.S. 554 (1988), concludes that in these circumstances, the right to confrontation is not denied so long as the witness

who purportedly made the pretrial identification testifies at trial and the defendant has an opportunity to cross-examine that witness.

Commonwealth v. Damiano, 444 Mass. 444 (2005) Holding that a private person's interception, via a police scanner, of a phone conversation between the defendant (on a cell phone) and a purported drug buyer (on a cordless phone) violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the SJC affirmed the motion judge's order suppressing the conversation and the marijuana found on the defendant when he was arrested, but reversed the order suppressing his post-Miranda statements to the police and cocaine found in his home after he consented to that search.

To reach this result, the SJC first rejected the Commonwealth's argument that the phone conversation constituted an "electronic" communication and not a "wire" or "oral" communication and thus was not covered by the suppression remedy of Title III. The SJC noted that Congress amended Title III in 1994 expressly to include cordless phone conversations within the definition of "wire communications." The SJC, as most jurisdictions have done, also rejected the Commonwealth's request to fashion a "clean hands" exception, which would allow the introduction of the evidence when the police did not illegally intercept the communication but merely received this information from a private party and then acted upon it. Such an exception runs contrary to both the plain language of the statute and the legislative history underlying it.

In resolving whether the suppressed evidence was "derived" from the illegal interception, as the statute requires for suppression, the SJC engaged in a "fruit of the poisonous tree" and related "attenuation" analysis, ultimately concluding that the Commonwealth had sufficiently proven that the defendant's statements at the police station, both acknowledging that he had more marijuana in his house and consenting to a search thereof, and the large stash of cocaine found in the subsequent search of the home, were purged of the taint of the illegally interception communication. The SJC concluded that because the defendant's statements were made after he was brought to the police station and after Miranda had been administered twice and he had signed a written waiver and because the police conduct, simply following up on information they received, was "reasonable and undertaken in good faith," the exclusionary rule should not be extended to cover the statements and cocaine.

Commonwealth v. Rodriguez, 63 Mass. App. Ct. 660 (2005) During a period of deadlock in jury deliberations on a trafficking charge, the foreperson reported to the judge that a deliberating juror, the apparent holdout for acquittal, had been speaking on the phone about her anger over the deliberation process. After questioning the foreperson and two other jurors who claimed to overhear these conversations, as well as the offending juror (who denied the conversations, but was not credited by the trial judge), the judge dismissed the juror and replaced her with an alternate, over the defendant's objection. The judge also denied the defendant's request for a mistrial when it became clear that another juror had conducted internet research which turned up G.L. c. 234, § 26B, which governs the procedure for discharging a deliberating juror, and shared that statute with the rest of the jurors.

The Appeals Court reversed the conviction, holding first that the trial judge abused her discretion when she discharged the juror who had the phone conversations about the deliberation process, because such a discharge "must be for reasons personal to the juror having nothing whatever to do with the juror's views on the case and her relations to her fellow jurors." Further, "[t]he jury instruction on the discharge provides an additional basis for reversal," because the instruction failed to tell the jury, as required by Commonwealth v. Connor, that the discharge had nothing to do with the juror's views on the case or relationship with fellow jurors, and here, there was

significant risk that the remaining jurors would think those were precisely the reasons. Finally, the exposure of the jurors to G.L. c. 234, §26B, obtained by a juror through internet research, highlighted the fact that some jurors were attempting to remove a dissenting juror, and "the jury's uninstructed consideration of the statute reinforces our conclusion that the verdicts cannot stand."

Practice Tip: In footnote 9, the Appeals Court states, "We also note more generally that the use of cellular telephones and other personal wireless devices should not be allowed during deliberations." Perhaps this merits a request for a jury instruction, at the beginning of the trial, informing the jurors that they may not take cell phones, blackberries, etc. into the deliberation room at all.

Commonwealth v. Johnston, 63 Mass. App. Ct. 680 (2005) The Appeals Court concludes that evidence that the defendant was intoxicated and depressed for several days prior to the date of the alleged armed assault with intent to murder did not warrant an instruction to the jury that the Commonwealth was required to prove malice which, in this context, means the absence of mitigation. In an assault with intent to murder prosecution, such an instruction is only required when evidence of justification, excuse, or mitigation is introduced, and the Appeals Court rejects the defendant's argument that, under Commonwealth v. Boateng, 438 Mass. 498 (2003), the defendant's days-long intoxication and depression constitutes the type of "frailty due to mental illness" that may mitigate malice. Specifically, the Appeals Court, while acknowledging that Boateng "read literally . . . suggests that mental illness is such a frailty of human nature" as to constitute mitigation, nonetheless interprets Boateng as not expanding mitigation beyond the traditional categories (heat of passion induced by reasonable provocation, sudden combat, or excessive force in self-defense). Further, the evidence here "falls far short of raising a reasonable doubt that the defendant suffered the type of clinical and psychotic condition considered in Boateng."

Commonwealth v. Caceres, 63 Mass. App. Ct. 747 (2005) Affirming a contempt order against the Womens Resource Center for failing to produce rape counseling records, the Appeals Court concludes the defendant made a sufficient showing of relevance, via his motion and affidavit, by demonstrating that the records sought will have a "rational tendency to prove or disprove an issue in the case" and by identifying the hearsay sources documented in his affidavit. Specifically, the affidavit "indicated that the victim (1) had been 'diagnosed with adjustment disorder, mixed anxiety and depression; (2) had experienced 'visual and auditory hallucinations; (3) had, in the opinion of a named clinician, 'changed her story with regard to the alleged misconduct of the defendant; and (4) had 'identified her sister . . . as a victim of sexual misconduct by the defendant, but that in an interview by a named individual, the sister stated that 'the defendant "never touched her.""

The Appeals Court rejects the Womens Resource Center's argument that it should be permitted to challenge the summons via an "opposition memorandum," rather than a motion to quash, as the motion to quash is the proper procedural mechanism outlined in Rule 17.

Finally, the Appeals Court rejects the Womens Resource Centers claim that it was entitled to notice and an opportunity to be heard prior to the issuance of the summons, as Rule 17 does not provide for such advance notice.

Commonwealth v. Murphy, 63 Mass. App. Ct. 753 (2005) While out on bail on indictments out of Middlesex Superior, the defendant was arrested on charges in Suffolk County and held on bail on that case. Thirteen days later, his bail in Middlesex Superior was increased though he was still physically held in the custody of the Suffolk Sheriff's Department. Ultimately, he pled guilty to the Middlesex indictments and received a sentence of nine to ten years in prison, then pled to the Suffolk charges and was sentenced to three to three and a half years, concurrent with the nine to ten, though he declined jail credit on the Suffolk charges so he

could obtain the credit on the longer Middlesex sentence. **The question was whether he was entitled to jail credit for the 546 days between the date of his arrest on the Suffolk charges and the date he was sentenced on the Middlesex indictments, and the Appeals Court held that he was entitled to the 536 days between the date his bail was increased in Middlesex, when he was then effectively held on that case, along with the Suffolk case, until the date his Middlesex sentence was imposed.**

Commonwealth v. Pagan, 63 Mass. App. Ct. 780 (2005) The Appeals Court affirms the motion judge's denial of a motion to suppress a gun found on the defendant's person, stating "the defendant's reaching for his waistband at the same time he walked away [from the police officer who sought to question him] justified the officer's belief that his safety and that of the other officers was at risk."

The Appeals Court does reverse the defendant's resisting arrest conviction, holding that a required finding of not guilty should have been granted as the contact between the defendant and the officer occurred when the officer "was in the process of restraining the defendant in order to conduct a protective patfrisk," not then intending to arrest the defendant.

Commonwealth v. Smith, 444 Mass. 497 (2005) The SJC holds that G.L. c. 22E, § 3, which requires the submission of a DNA sample by any person "convicted of an offense that is punishable by imprisonment in the state prison," applies to people convicted of felonies in the District Court. The Court rejects the defendant's argument that because he was sentenced to the house of corrections in District Court and District Court judges lack legal authority to sentence any defendant to state prison**,** the DNA requirement does not extend to him. According to the SJC, both the plain language of the statue and the legislative intent dictate that the triggering factor "is whether the 'offense is so punishable, not whether the individual defendant was sentenced to State prison, or whether the individual defendant could have been sentenced to State prison by the sentencing judge."

Commonwealth v. Almonte, 444 Mass. 511 (2005) Ten years after the victim was shot and a witness identified the defendant as the shooter, resulting in an arrest warrant for the defendant, he walked into a New York City police station and informed an officer that he had been involved in the shooting (though did not say he was responsible for it) and that there was an outstanding warrant for his arrest. After confirming the warrant and arresting the defendant, officers Mirandized him and, when asked if he was willing to answer questions, the defendant stated, "I believe I've said what I have to say." The officers asked the defendant if he would answer some additional questions, which he agreed to do, and upon further questioning, he confessed to shooting the victim. **After holding that Miranda warnings were not necessary prior to the initial statements because the defendant was not then in custody, the SJC rejects the further claim that prior to the confession the defendant had invoked his right to remain silent, concluding that the defendant was merely expressing "his opinion that he had already told [the first officer] as much as he knew about the prior offense." The SJC reaches this conclusion based on statements made both before and after the claimed invocation.**

Comment/Practice Tip: Appellate counsel for Almonte, Beth Eisenberg, points out that in relying on the defendant's statements *after* he purportedly invoked his right to remain silent in order to determine that he really was not invoking that right, the SJC completely ignores Smith v. Illinois, 469 U.S. 91 (1984), which holds that "an accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request [for counsel] itself." Id. at 100 (emphasis in original). Thus, in litigating motions to suppress statements involving arguable invocations of either the right to remain silent or the right to counsel, make sure to remind the motion judge of this holding from Smith v. Illinois.

Just as it did in Commonwealth v. Perez, 444 Mass. 143, the SJC again rejects the argument that, in light of Appendi v. New Jersey, 530 U.S. 466 (2000) and its progeny, the trial judge must instruct the jury that they need to be unanimous on any particular Cuneen factors in order to find the defendant guilty of first degree murder under an extreme atrocity or cruelty theory.

Practice Tip: Despite Perez and now Almonte, continue to request the specific unanimity instruction on the Cuneen factors pursuant to the rationale of Apprendi and its progeny, because the Supreme Court ultimately might disagree with the SJC on this issue.

Commonwealth v. Rosario, 444 Mass. 550 (2005) The SJC reverses the defendant's drug distribution convictions because the trial judge erroneously prohibited the defendant from exhibiting an individual (Pedro) to the jury so the co-defendant, who testified that someone other than the defendant gave him the drugs he sold the undercover officer, could identify Pedro as his true supplier. Although the Court acknowledged that the trial judge has significant discretion in weighing the probative value versus the prejudicial effect of any particular evidence, the SJC concluded that the trial judge abused her discretion in engaging in this calculus. First, the Court noted that where the identification of the defendant as the person who provided the drugs to the codefendant was "the entire crux of the case," "the proposed presentation of Pedro was highly probative on the critical issue in the case," both because such an in-court identification could not easily be dismissed and because the jury would then be able to compare Pedro's appearance to that of the defendant in order to judge whether the officer who identified the defendant could have been mistaken. Second, the Court concluded that the trial judge's concerns about the prejudicial effect of this presentation—(a) that presenting Pedro to the jury without his testifying would be "tantamount to telling them that he's exercised his Fifth Amendment privilege" and (b) that the jury might "speculate" that Pedro committed the crime—were misplaced. Regarding the first concern, the Court noted that any worry that that jury might speculate about why Pedro did not testify could be addressed "by standard instructions telling jurors not to speculate" or with a more specific, directed instruction. Regarding the second concern, the Court pointed out that "whether Pedro committed the crime would not be a matter of 'speculation'. The jury would have direct evidence of Pedro's commission of the crime."

Significantly, the SJC rejects the Commonwealth's argument that no error occurred because the defendant declined the judge's invitation to introduce a photograph of Pedro and have the codefendant identify that photograph instead of the requested live exhibition and in-court identification. "That the defendant might have had other, less effective means of identifying Pedro does not justify the judge's exclusion of an in-court, in-person identification."

Comment: On this last point, the SJC states in footnote 3 that "[w]here a judge has erroneously precluded a defendant from presenting his defense in the most effective manner, the defendant is not required to employ the less effective means allowed him in order to preserve the error for appeal."

Commonwealth v. Edwards, **444 Mass. 526 (2005) The SJC adopts the "forfeiture by wrongdoing" exception to the hearsay rule, which permits the substantive admission of a witness's out-of-court statements "against defendants who . . . procured the unavailability of that witness." To meet this exception, the Commonwealth must prove by a preponderance of the evidence, at a pretrial evidentiary hearing where hearsay is admissible, the following: "(1) the witness is unavailable; (2) the defendant was involved in, or responsible for, procuring the unavailability of the witness; and (3) the defendant acted with the intent to procure the witness's unavailability." The Court notes that "[a] defendant's involvement in procuring a witness's unavailability need not consist of a criminal act, and may include a defendant's collusion with a witness to ensure that the witness will not be heard at trial." More specifically, "a defendant must have contributed to the witness's unavailability in some significant manner." The Court spells out three different categories of conduct which may constitute forfeiture by wrongdoing: "(1) a defendant puts forward to a witness the idea to avoid testifying, either by threats, coercion, persuasion, or pressure; (2) a defendant physically prevents a witness from testifying; or (3) a defendant actively facilitates the carrying out of the witnesss independent intent not to testify." In the last category—the collusion situation—the method of the witness's ultimate unavailability need not be the one suggested in the collusion between the defendant and witness, but "must, at the very least, be a logical outgrowth or foreseeable result of the collusion."**

In footnote 23, the Court assures us that "merely informing a witness of the right to remain silent" does not constitute forfeiture by wrongdoing, as "[p]roviding such publicly available information to a witness does not constitute 'pressure or 'persuasion."

Comment: Because a pretrial hearing is required before this doctrine may be applied against a defendant, the Commonwealth must provide the defense pretrial notice of its intention to proceed under the forfeiture by wrongdoing theory. How much pretrial notice is necessary is not discussed in the opinion.

Commonwealth v. Keohane, **444 Mass. 563 (2005) Affirming this first degree murder conviction, the SJC rejects the defendant's claims that his counsel was ineffective for failing to request a voluntary manslaughter instruction and that the judge erred in not giving the instruction sua sponte, for two reasons. First, the evidence—that after being assaulted by the victim, the defendant left the scene of the assault, and returned at least 3½ hours later to kill the victim—did not warrant such an instruction. The Court states that "[a]ction in response to an event that occurred three and one-half hours earlier is the very antithesis of action in the 'heat of passion" and "even where sufficient provocation exists, if a defendant leaves the scene of the provocation (as here) and then returns to attack the victim, the defendant is considered to have had adequate opportunity for his anger to subside." In footnote 4, the Court states, "A defendant's sudden discovery of ongoing spousal infidelity seems to be an exception that may warrant a longer 'cooling off period'." Second, such an instruction would have undermined the reasonable defense strategy undertaken—to convince the jurors that someone else killed the victim.**

The Court also concludes that the trial judge did not abuse his discretion in precluding the defense from eliciting evidence of the victim's racist attitude on the theory that a third-party, Michael Hawkins, was motivated to kill the victim because of this attitude. The Court reasoned that the defense was allowed to present evidence of Hawkins animus towards the victim, as well as other evidence that could point to Hawkins as the killer, but that "the defendant never

made a showing that racial bias on the victim's part was a motivation for his murder or had any role in the interaction between the defendant, the victim, and the others involved in the events immediately preceding the murder."

Finally, the Court resolves that the trial judge was within his discretion both in refusing to conduct individual voir dire of prospective jurors regarding graphic photographs and to display two autopsy photos to the venire, and to admit those photographs. The judge did inform the venire that they would hear "graphic testimony" and view "graphic photographs" and asked if this would make it "difficult" or "uncomfortable" for them to be fair and impartial, which the SJC concluded "adequately dealt with the issue." Further, the photos admitted were deemed relevant "to support [the Commonwealth's] theory of how the murder occurred," and on the questions of extreme atrocity or cruelty and premeditation and deliberation, and the judge issued appropriate cautionary instructions.

Commonwealth v. Wright, 444 Mass. 576 (2005) Affirming this first degree murder conviction, the SJC holds that where the defense attacked the credibility of the joint-venturer who testified for the Commonwealth both by pointing out his deal with the Commonwealth and getting the witness to acknowledge that he "lied about almost everything" in his original statement to the police, the prosecutor was properly permitted on redirect to elicit the entirety of that statement to the police, both to show that everything in that statement was not false and as prior statements consistent with his trial testimony. The SJC rejected the defendant's argument that although he was claiming a motive to lie based on the witness' s deal with the Commonwealth, which post-dated the statement to the police, the witness also had a motive to fabricate at the time he gave that statement, and thus, the statements should not have been admitted as prior consistent statements. The SJC concludes that the statements were nonetheless admissible to rebut the claim of recent contrivance based on the deal.

The SJC does, however, note that it was improper for the prosecutor to ask the witness to tell the jury which portions of his statement were true and which were false, because a witness may not be asked to assess the credibility of his own testimony or that of another witness, but the unobjected-to error "was more likely designed to clarify [the witness's] testimony that 'he lied about almost everything' in his previous statements to the police and to rebut the defendant's claim of recent contrivance, than to bolster [his] testimony," and thus did not create a substantial likelihood of a miscarriage of justice.

Commonwealth v. Talbot, 444 Mass. 586 (2005) Exercising its supervisory power, the SJC holds that "if requested by the defendant or her attorney, probation officers must give the defendant's attorney notice and a reasonable opportunity to attend a presentence interview of the defendant." The Court remands this case for resentencing because defense counsel's explicit request to be present for this interview was not honored. While not deciding whether a presentence interview constitutes a "critical stage" in the process so as to trigger the Sixth Amendment right to counsel, the SJC does say that the interview "has due process implications with respect to a defendant's interest in a fair and even-handed sentencing proceeding" and "may have a significant impact on a defendant's liberty interest."

Practice Tip: Counsel should always request to be present at the presentence interview to avoid waiver of this right. When the court requests that probation prepare a presentence report, counsel should inform the court that she/he wishes to be present at the interview and then file a written request with the court, the chief probation officer, and the probation officer who is to conduct the interview, citing Talbot, quoting the relevant portion of the opinion, and including a copy of the opinion with the letter to probation.

In affirming the convictions for forcible rape of child and indecent assault and battery on a

child, based on a theory that the defendant permitted her boyfriend to commit these offenses against her daughters, the Court rejects the defendant's claim that evidence of a prior false allegation of sexual abuse was erroneously excluded. The proferred evidence was that one of the complainants, when seven years old, told a classmate that she was having sex with her old boyfriend but later told school officials that "she didnt mean it" and "it was a joke." **In concluding that this was not admissible under the line of cases beginning with Commonwealth v. Bohannon, 376 Mass. 90 (1982), the Court states the following: *"Admissibility under the Bohannon rule requires a showing that 'the witness was the victim in the case on trial, her consent was the central issue, she was the only Commonwealth witness on that issue, her testimony was inconsistent and confused, and there was a basis in independent third-party records for concluding that the prior accusations of the same type of crime had been made and were false."* (quoting Commonwealth v. Sperrazza, 379 Mass. 166, 169 (1979).** The Court then reasons that because consent was not at issue in this case, because the complainant's retraction of the claimed sex did not "establish that her statement was false," and because the evidence did not "establish the necessary 'crying wolf' pattern to the allegations," the evidence was properly excluded.

Comment: See article discussing this opinion's handling of the Bohannon evidence in this issue of The Zealous Advocate on pps. 8-10.

Commonwealth v. O'Laughlin, 63 Mass. App. Ct. 805 (2005) In this fact-intensive opinion, **the Appeals Court concludes that the defendant's motion for a required finding of not guilty on all charges should have been granted, because despite "evidence of motive, means, opportunity, and consciousness of guilt," "[n]othing in the record sufficiently links the defendant to the crime to permit the conclusion beyond a reasonable doubt that he was the perpetrator."** In reaching this conclusion, the Appeals Court considered the lack of evidence linking the defendant to the crime, evidence of the defendant's appearance shortly after the crime which appears contrary to the claim that he committed the crime, and to some significant "third-party culprit evidence" which "detracted from the Commonwealth's case."

Commonwealth v. Copson, 444 Mass. 609 (2005) While a prisoner in federal custody in another state, the defendant filed a pro se motion for a speedy trial pursuant to the Interstate Agreement on Detainers on a case for which he had been indicted but not yet arraigned in Superior Court, due to his flight from the Commonwealth. When the defendant was finally brought to the Commonwealth and arraigned on the indictments, he moved for dismissal of the indictments for failure to comply with the Interstate Agreement on Detainers requirement that he be brought to trial within 180 days of the filing of his speedy trial motion. The trial court allowed the motion. **The SJC reverses the trial court's dismissal of indictments, holding "that the 180-day period of the Agreement only commences when a prisoner demonstrates at the very least that he has provided the Commonwealth with all the information called for in art. III [of the Agreement], including a certificate of inmate status. In particular, the prisoner must provide to his custodian written notice of his place of imprisonment and a proper request for a final disposition; and the custodian must forward the request, together with a certificate of inmate status that includes all the information specified in art. III(a), to the prosecuting officer and the appropriate court in the Commonwealth. The prisoner must ensure that the Commonwealth has received all of this necessary information." Because the defendant's motion failed to include all of this required information, the 180 day period did not begin to run until significantly later, and thus, the indictments were erroneously dismissed.**

Commonwealth v. Bly, **444 Mass. 640 (2005) In this opinion, the SJC abandons "the power of resurrection" doctrine in criminal cases, meaning that a trial court judge, when ruling on a motion for a new trial prior to the defendant's direct appeal, may no longer resurrect issues not raised and properly presented at trial.** The Court reasons that this doctrine is no longer necessary because when it was adopted, the appeals courts had no power to consider unpreserved issues, whereas now such issues are considered on appeal, just under a different standard of review than preserved issues.

Affirming this first-degree murder conviction, the SJC holds that although defense counsel "may well have succeeded" on a motion to exclude the defendant's prior murder conviction, failure to file that motion and introduction of the conviction and the resulting life sentence were consistent with the defense strategy, which was not "manifestly unreasonable," of showing that certain Commonwealth witnesses would falsely accuse the "expendable" defendant rather than the real shooters. Nor was the judge obligated to exclude this evidence sua sponte. **Finally, although the SJC concluded that the prosecutor did improperly elicit details concerning that murder conviction, specifically the identity of the victim, on cross-examination of the defendant concerning, this unobjected-to error did not create a substantial likelihood of a miscarriage of justice.**

Similarly, while it was not erroneous for the prosecutor to impeach a key defense witness, who testified that he and not the defendant killed the victim, with evidence that the witness was presently serving a life sentence for murder, as such evidence was relevant to his motive to lie, the prosecutor improperly elicited details concerning that conviction, though again, this error did not create a substantial likelihood of a miscarriage of justice.

Practice Tip: This case reminds us that although evidence concerning penalties or potential consequences for convictions are generally not admissible, such evidence may be relevant and thus admissible in a particular case. We therefore should think creatively about how, for example, a police officer's knowledge of the potential penalties a defendant faces if convicted might be relevant to that officer's motive to lie.

Commonwealth v. DiJohnson, **63 Mass. App. Ct. 855 (2005)** In performing part-time billing services for the complainant, the defendant took hand-written information from the complainant and compiled it, along with other information, in a database on the defendant's laptop computer. After a falling out between the two, the defendant refused the complainant's request to provide her with the database. The defendant was ultimately charged with and convicted of larceny of property over $250 for the alleged theft of the database. **The Appeals Court concluded that the defendant's motion for required finding of not guilty should have been granted, because if the defendant was operating as an independent contractor rather than an employee, the database belonged to the defendant not the complainant, and the Commonwealth failed to prove that the defendant was an employee.**

Comment: There is nice language at the end of this opinion suggesting the wrong-headedness of the Commonwealth's pursuit of criminal charges to resolve a business dispute.

Iamele v. Asselin, **444 Mass. (2005) The SJC holds "that a plaintiff seeking an extension of a protective order must make a showing similar to that of a plaintiff seeking an initial order—most commonly, the plaintiff will need to show a reasonable fear of imminent serious physical harm at the time that relief . . . is sought."**

Commonwealth v. Lugo, **64 Mass. App. Ct. 12 (2005) The Appeals Court holds that where the police had a warrant to search the**

defendant's apartment and vehicles, removal of the vehicles to the police station to conduct the search shortly after their arrival at the station did not constitute a search exceeding the scope of the warrant, and thus, the motion to suppress was correctly denied. The Court reasoned that the defendant's privacy, the interest protected by the prohibition against unreasonable searches and seizures, is no more offended by a search conducted at the police station than one conducted in front of the defendant's residence

Further, the motion judge acted within his discretion under Rule 13(a)(5) in allowing the Commonwealth's motion for reconsideration—after first allowing the motion to suppress following a hearing where the Commonwealth presented no evidence—and then permitting the Commonwealth to present evidence not initially presented, after which the motion judge reversed his initial decision and denied the motion to suppress.

Commonwealth v. Righini, 64 Mass. App. Ct. 19 (2005) After a District Court judge ordered the Commonwealth to provide the defendant with the names and dates of birth of police officer witnesses, the Commonwealth provided the criminal records of the officers but redacted their dates of birth and other personal identifying information. Unsatisfied with this response, the defendant argued he was entitled to the dates of birth under G.L. c. 218,§ 26A and that he needed this information to obtain home addresses in order to conduct a proper investigation. When the Commonwealth refused to turn over this information, the judge allowed the defendant's motion to dismiss the charges. **Reversing that dismissal order, the Appeals Court concludes that "the plain language of both §26A and rule 14 do not entitle the defendant to discovery of the birth dates of the law enforcement witnesses," and where the Commonwealth did provide the criminal records of the law enforcement witnesses, the defendant demonstrated no further need for this information.**

Commonwealth v. Hampton, 64 Mass. App. Ct. 27 (2005) The Appeals Court holds that the rule announced in Commonwealth v. Quincy Q., 434 Mass. 859 (2001)—that for a defendant to be convicted and sentenced as a youthful offender, the Commonwealth must prove to a jury beyond a reasonable doubt not only the underlying crime but the other statutory requirements under the youthful offender statute—does not apply retroactively to a conviction where all direct appeals were concluded prior to Quincy Q.

Commonwealth v. Jaundoo, 64 Mass. App. Ct. 56 (2005) Reversing the defendant's convictions on five counts of statutory rape and two counts of indecent assault and battery on a child, the Appeals Court concludes that the trial judge abused his discretion in admitting "a large quantity of pornographic material" seized from the defendant's home "which was unrelated to the alleged crime." Although a few of these items could be said to corroborate the complainant's testimony, most of the materials was not probative on this point, and further, the judge did not weigh the prejudicial effect against the probative value of the material.

The Appeals Court does conclude that "reference by acronym to a 'SAIN interview . . . did not amount to prosecutorial vouching, and testimony that a second report of abuse to the Department of Social Services was 'supported' was not error."

Commonwealth v Brazeau, 64 Mass.App.Ct. 65 (2005) Reversing this operating under the influence conviction, the Appeals Court concludes that the defendant's motion to suppress should have been granted because the police officer's observation of three small objects hanging from the rearview mirror – the only asserted basis for the stop-did not demonstrate a violation of G.L. c.90, §13, which prohibits driving with anything "which may interfere with or impede the proper operation of the vehicle," sufficient to justify the stop.

Commonwealth v. Shellenberger, 64 Mass. App. Ct. 70 (2005). The defendant, whose passenger was killed when her van crashed into a stone abutment on a wet, slippery road, was charged with motor vehicle homicide by negligent operation, but not with impaired operation while under the influence of proscribed chemicals or substances. In his opening statement, the prosecutor discussed the defendant's reckless driving and excessive speeding, but made no mention of amphetamines or other drugs. In fact, the Commonwealth's accident reconstruction expert opined that excessive speed caused the accident. When the Commonwealth's pathologist testified, however, the prosecutor asked him not only about the cause of death,but also about a reference in the defendant's medical records to a positive test result for amphetamines. In closing argument, the prosecutor argued that the defendant's ingestion of amphetamines alone could be used as a basis to convict her of the negligent motor vehicle homicide charge. **The Appeals Court reverses the conviction, holding that absent an evidentiary foundation establishing the concentration of amphetamines in the defendant's system and an expert opinion regarding the effect of such an amount on her ability to safely operate the van, this evidence was improperly admitted and argued, and may have wrongly contributed to the verdict.**

Commonwealth v. Hill, 64 Mass. App. Ct. 131 (2005). The Appeals Court concludes that where the defendant was stopped for a traffic infraction approximately twenty-four hours after and one mile from a breaking and entering by the officer who investigated the B and E who noticed that the defendant and the car he was in matched descriptions given in the B and E investigation, it was not unnecessarily suggestive to bring the B and E victim to the site of the traffic stop for a show-up identification procedure, even when the victim was informed she would be viewing a potential suspect and the defendant was the only black person present surrounded by several white uniformed police officers.

Commonwealth v. Mitchell, 444 Mass. 786 (2005) See "CPCS Training Alert" on p. 11.

Commonwealth v. Reed, 444 Mass. 803 (2005). The SJC reverses the two rape of child and two indecent assault and battery on a child convictions because "there were two separate errors that in combination . . . deprived the defendant of the opportunity to develop his defense fully."

First, the SJC concludes that a motion judge erroneously denied the defendant's pretrial motion for the issuance of a summons for medical records documenting a pelvic exam of the complainant six weeks before the alleged sexual assault, because those records "bore on a critical fact in the defendant's case: whether the erythema described by the nurse in March [post-alleged assault] was corroborative of [the complaining witness'] allegations." The SJC stated, "If [the] earlier pelvic examination had revealed erythema similar to (or more serious than) the erythema noted by the nurse in March, the Commonwealth s theory that the March results were probative of sexual assault may have been significantly undercut." The SJC notes that "[w]hen a party cannot know for certain the contents of a requested document, it is appropriate for a court to order the issuance of a summons pursuant to rule 17(a)(2) on a showing of the relevance of what the document is likely to contain." The Court also clarifies that the standard articulated in Lampron that a motion for pretrial summons of third-party records must show "that the documents are evidentiary and relevant" means that the moving party most demonstrate that the documents "are likely to be admissible at hearing or trial" and "have a rational tendency to prove or disprove an issue in the case."

Second, the trial court erred when it precluded the defendant from eliciting testimony that the defendant denied the accusations when his father (the complainant's grandfather), having just heard the accusation, confronted the defendant. The SJC concluded that it was error, though the defendant did not object, to permit the

grandfather to testify at all about his confrontation with the defendant, but once that testimony was allowed, **the doctrine of curative admissibility** requires the admission of the defendant's response—denying the accusations—even though that would otherwise be deemed inadmissible hearsay. Rejecting the Commonwealth's argument that the doctrine should not be applied because the defendant did not suffer "significant prejudice," the SJC states "that a defendant almost always suffers significant prejudice when he is unable to counter evidence of an out-of-court accusation made in his presence with evidence from a third party that the defendant promptly and completely denied the accusation." Further, the prejudice was compounded here when the Commonwealth elicited evidence that the defendant cried himself to sleep that night, from which "the jury could well have concluded that defendant was showing remorse after having been caught in the commission of a crime." The SJC did conclude that the trial judge acted within his discretion in ruling that the defendant's denial did not qualify as an excited utterance.

Commonwealth v. Cutts, 444 Mass. 821 (2005). Affirming this first degree murder conviction, the SJC rejects the defendant's various ineffective assistance of counsel claims.

First, the SJC concludes that defense counsel was not ineffective for failing to retain an expert in addiction psychiatry to advance a lack of criminal responsibility defense based on a theory of cocaine-induced psychosis, because defense counsel did hire a clinical psychologist and forensic psychiatrist who explored his substance abuse and mental health conditions, opining that the defendant was not insane but did suffer a diminished capacity as a result of "homosexual panic" condition—the chosen defense at trial.

Second, counsel's failure to move to suppress the defendant's confession was not ineffective, because counsel's affidavit indicated that there were no legal grounds to suppress the statement and that admission of the confession was strategically advantageous in that it allowed the defendant to advance his diminished capacity defense without the need for his testimony.

Third, it was not ineffective to fail to challenge, via a request for voir dire, rulings of law, or jury instructions, the voluntariness of admissions the defendant made to two civilian witnesses based on evidence the defendant was intoxicated, because while the intoxication evidence "was at best conflicting" and other evidence "supports a conclusion that Cutts was nonetheless rational."

Fourth, the failure to object to testimony regarding the nature of the defendant's prior incarceration was not ineffective as that evidence was admissible, both as an admission and to prove motive, and although testimony on the length of the defendant's prior incarceration was irrelevant, it was "not so prejudicial as to create a substantial likelihood of a miscarriage of justice."

Finally, although the Commonwealth "failed specifically to link the hemorrhages in [the victims] eyes [depicted in a photograph] to the manner and cause of his death," the admission of the photograph, "far less gruesome than the other photographs of the victims injuries" also "did not result in a substantial likelihood of a miscarraige of justice."

Commonwealth v. Colon, 64 Mass. App. Ct. 303 (2005). Affirming numerous sex offense convictions, the Appeals Court first rejects the defendant's claim that a portion of the defendant's statement to police in which he attempts to explain why the victim accused him should have been excluded as inadmissible comment on a witness credibility. The Appeals Court reasons that the rule against allowing one witness to comment on the credibility of a the testimony of another witness does not apply, because when the statement was given to the police, the defendant "was not testifying as a

witness at trial, and he was not commenting on the testimony of another witness," and the statement "was properly considered by the jury as an admission, another bit of information to be used in its assessment of the charges." The Appeals Court further notes that even if error, the admission of this statement was harmless.

Further, the Appeals Court rejects several asserted grounds for error regarding the prosecution's expert witnesss reference to a study in the journal Pediatrics, apparently supporting her opinion that a noted injury to the victim resulted either from an intentional act or "an exceedingly rare accident."

The one preserved ground on which this testimony was challenged, that the answer was unresponsive, the Appeals Court concludes cannot be gleaned from "the cold transcript," though the court posits an interpretation of events in which it deems the testimony responsive to the question. Addressing the other two grounds raised on appeal but not at trial—that the testimony improperly touched upon the ultimate issue for the jury and that it was hearsay—the Appeals Court concludes admission of the testimony did not create a substantial risk of a miscarriage of justice.

Commonwealth v. Gonsalves, 445 Mass. 1 (2005) See Article on p. 7.

Commonwealth v. Foley, 445 Mass. 1001 (2005) Applying the rule announced in Commonwealth v. Gonsalves (see Article on p. 7)—that law enforcement questions aimed either to secure a volatile scene or ascertain the need for or provide medical care do not constitute police interrogation and thus the responses are not testimonial per se—the SJC held that "the officer's initial question, 'Where is he?, asked while searching for the perpetrator, was not police interrogation. Neither were his initial questions on returning to the adult victim, asking about her need for medical care." The SJC also held that these statements were not testimonial in fact, as "a reasonable person in each declarant's position would not have anticipated that either the child's or the adult victim's statement would be used against the accused in investigating and prosecuting the crime." "In contrast, statements made in response to police questioning after the scene was secure and the victim had assured the officer she did not want emergency medical attention were made in response to investigatory interrogation. As such, they were testimonial per se."

Commonwealth v. Rodriguez, 445 Mass. 1003 (2005) The SJC reverses the defendant's assault and battery conviction because the trial judge admitted, over objection, two police officers' testimony that after responding to a 911 call of a domestic disturbance, they spoke with the alleged victim—the defendant's son—and the defendant's daughter and obtained "extensive details regarding the [alleged] assault." The SJC held that these statements were "testimonial per se" as they resulted from "police interrogation," and because the defendant never had an opportunity to cross-examine the declarants, the admission of the testimony violated the defendant's Sixth Amendment confrontation rights.

The SJC further states that "[t]he judge's sua sponte instruction that 'no Massachusetts decision or statute grants parents or others the rights to use reasonable force in disciplining a child', while technically correct, may have misled the jury."

CALENDAR OF UPCOMING TRAINING EVENTS

- **Sex Offender Registration & Notification Certification**
  December 5th at MCLE, Winter Place, Boston, MA. This event is **mandatory** for all CPCS criminal defense practitioners on the District, Juvenile and Superior Court lists- **except those who have already taken it**. This is a one-time training requirement in order to maintain your certification. If you have already attended one of the Sex Offender Registration & Notification training programs offered in 2002, 2003, and 2004 then you do not need to attend this program. To register, go to http://www.mcle.org or call MCLE at 1-800-966-6253.

- **Confronting Crawford: Understanding Its Meaning and Impact**
  The Center for Advanced Legal Studies, The Marconis Institute for Trial and Appellate Advocacy and the Flaschner Institute are jointly sponsoring this program on November 10, 2005 from 4:30 - 7:30 pm. There are several cases before the SJC in which the contours of the *Crawford* doctrine will be drawn under Massachusetts law. They are offering a reduced fee ($79.00) for lawyers who accept appointments through CPCS. For more info go to: http://www.law.suffolk.edu/academic/als/coursedetail.cfm?cid=477

- **Boston Bar Association Criminal Law Section: Federal Sentencing of Organizations — and Other Hot Topics**
  http://www.bostonbar.org/rsvp.cfm
  Thursday, November 10, 2005, 12:00 p.m. - 2:00 p.m., Boston Bar Association

  Senior members of the US Probation Staff will review the provisions for sentencing of organizations under Chapter 8 of the Sentencing Guidelines, and provide an update on current sentencing practices in the federal court.

- **Boston Bar Association Criminal Law Section: Criminal Offender Record Information and Prospects for Reform**
  Co-Sponsored with Civil Rights & Civil Liberties Section and Labor & Employment Law Section http://www.bostonbar.org/rsvp.cfm. Thursday, November 17, 2005, 12:30 p.m., Boston Bar Association

  In Massachusetts, employers often seek Criminal Offender Record Information (CORI) in evaluating potential employees. What restrictions exist on an employer's right to obtain such information? Does the CORI system strike the right balance between the right to know and the public interest in the rehabilitation of ex-offenders?

  Ernest (Tony) Winsor, of the CORI Project of the Massachusetts Law Reform Institute, will discuss the CORI system and possible improvements, including pending legislation supported by the CORI Project.

  There will be written materials available and time for questions.

- **MCLE Criminal Law Conference**
  December 9, 2005, 9 a.m to 5 p.m. at M.C.L.E., 10 Winter Place, Boston MA 02108. To register, go to http://www.mcle.org

- **CPCS Bar Advocate Certification Training Zealous Advocacy in the District And Juvenile Courts**
  This five-day program is the CPCS bar advocate training course and it is held various times throughout the year. This course is a certification requirement for attorneys who wish to accept Criminal Cases in the District Court and Juvenile Delinquency Cases through CPCS.
  An attorney must complete an application and be approved by **both** CPCS **and** a County Bar Advocate Program before being admitted to the course. An application for this certification course can be found on our website at http://www.mass.gov/cpcs/training/zealous.htm
  Upcoming dates for this course are:
  January 23, 24, 25, 30, 31, 2006 (Boston MCLE)
  March 22, 23, 24, 27, 28, 2006 (Location Outside of Boston TBA)
  May 22, 23, 24, 30, 31, 2006 (Boston MCLE)

- **CPCS Public Defender Division New Lawyer Training Course**
  9/9 -10/7/05; 12/5 SORB at MCLE; 12/8 (PD Conference); 1/12 & 13; 3/2 & 3; 4/20 & 21; 5/11 (Annual Conference); 6/21 – 23 & 26 & 27.

- **NLADA Appellate Defender Training**
  January 25-29, 2006, Chicago IL. For more information go to:
  http://www.nlada.org/Training

- **National Legal Aid and Defender Association Annual Conference**
  November 16 – 19, 2005 "Defining the Future: The Fundamental Value of Justice for All" Orlando, FLA. For more information: http://www.nlada.org/Training

- **CPCS Public Defender Division Training Conference**
  12/8 at Suffolk Law School. (Open only to CPCS Public Defender Staff)

- **National Criminal Defense College THEORIES, STORIES & IMPROV**
  Spring of 2006 (dates TBA) in Atlanta, Georgia. For more information go to: *http://www.ncdc.net* or call Rosie Flanagan at (478) 746 – 4151.

- **CPCS Annual Training Conference**
  May 11, 2006 at the DCU Center (formerly the Centrum) in Worcester, Massachusetts.

- **National Criminal Defense College TRIAL PRACTICE INSTITUTE**
  Two sessions - summer of 2006 in Macon, Georgia. Dates and applications TBA. For more information go to: *http://www.ncdc.net* or call Rosie Flanagan at (478) 746 – 4151.